SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

RUFUS ROBINSON,	)	
	)	
Plaintiff,	)	
	)	CASE NO. CV-22-1234
v.	)	
	)	BRIEF OPPOSING
	)	DEMURRER TO
	)	AMENDED COMPLAINT
MARTY STANCLIFF,	)	
	)	
Defendant.	)	

Argument

I. THE COURT SHOULD NOT GRANT THE DEFENDANT'S DEMURRER BECAUSE THE PLAINTIFF HAS PLED FACTS SHOWING THAT HE MAY BE ENTITLED TO SOME RELIEF DUE TO THE DEFENDANT'S NEGLIGENCE.

The Court should not grant the defendant's demurrer because the plaintiff has pled facts showing that he may be entitled to some relief, therefore, the allegations of the complaint must be regarded as true. *Fundin v. Chicago Pneumatic Tool Co.*, 152 Cal. App. 3d 951, 955, 199 Cal. Rptr. 789, 792 (1984). A demurrer tests only the legal sufficiency of the pleading and does not require the plaintiff to substantiate the facts alleged in the complaint. *Ferrick v. Santa Clara Univ.*, 231 Cal. App. 4th 1337, 1341, 181 Cal. Rptr. 3d 68, 73-74 (2014). Granting a demurrer at this stage would deny the plaintiff of his rights to pursue legal action against the defendant whom he believes caused harm to him. *Fundin*, 152 Cal. App. 3d at 955, 199 Cal. Rptr. at 792 (1984). The plaintiff must be given a day in court in order to present each evidentiary fact that would support his claim and provide relief for damage caused.

In order to provide a wider avenue of relief for plaintiffs that are injured by the negligent acts of another, California courts have expanded their view on the type of plaintiffs that can recover on a claim for bystander NEID. Of the three elements required to establish the claim, only one element

is being contested. The final element to be proven is that the plaintiff was "present at the scene of the injury-producing event at the time it occurred and was then aware that it was causing injury to the victim." *Thing v. La Chusa*, 48 Cal. 3d 644, 645 771 P.2d 814, 815 (1989). The defendant has conceded to the fact that the plaintiff was "virtually present" at the scene because he heard it over the phone as it happened, *see Ko v. Maxim Healthcare Servs.*, 58 Cal. App. 5th 1144, 1159, 272 Cal. Rptr. 3d 906, 919 (2020). Furthermore, this brief will show that the plaintiff, Mr. Robinson, clearly and distinctly perceived the accident and was therefore contemporaneously aware of the causal connection between the injury-producing event and the resulting injury.

An accident is clearly and distinctly perceived when the bystander is contemporaneously aware of the causal connection between the injury-producing event and the resulting injury. *Ko,* 58 Cal. App. 5th 1144 at 1158, 272 Cal. Rptr. 3d 906 at 919. Contemporaneous awareness does not require a visual perception of the impact causing the death or injury. *Krouse v. Graham*, 19 Cal. 3d 59, 76, 562 P.2d 1022, 1031 (1977). Instead, all that is required is that the plaintiff was sensorially aware, in some important way, of the injury-producing event and that they are *certain* (emphasis added) that the resulting injury was caused by that event as it was occurring. *Wilks v. Hom*, 2 Cal. App. 4th 1264, 1271, 3 Cal. Rptr. 2d 803, 807 (1992).

The plaintiff may clearly and distinctly perceive the causal connection of the injury-producing event and the resulting injury when they are aware of the location of the victim in relation to the accident. *Krouse*, 19 Cal. 3d at 65, 562 P.2d 1022 at 1024. In *Krouse v. Graham*, the husband of the decedent was in a parked car outside of their neighbor's home while the decedent was near the back of the car unloading groceries. *Id.* Suddenly, the defendant's vehicle approached the curb near the Krouses' vehicle, striking the decedent before colliding with the parked car. Prior to the accident occurring, the plaintiff observed the defendant's vehicle approaching at a high speed in the direction in which their car was positioned. *Id.* Although the plaintiff did not see his wife get struck by the defendant's vehicle, the court ruled that he fully perceived the fact that his wife had been struck by the car due to her position right before the defendant made an impact with the plaintiff's car. *Id.* at 76 and 562 P.2d 1022 at 1031. Furthermore, the plaintiff experienced the force of the impact while in the car. *Id.* at 71, 562 P.2d 1022 at 1027. Because he knew her position before the impact, saw the car heading toward that same direction at a high speed, and experienced the impact of the vehicle, he was

contemporaneously aware of the injury-producing event and was allowed to recover under bystander NEID.

Showing that the bystander has been "personally impressed" by the injury-producing event, is enough to prove that the plaintiff knew of the likely severe damage […] and would therefore satisfy the contemporaneous awareness element. *Wilks*, 2 Cal. App. 4th at 1271, 3 Cal. Rptr. 2d at 807. For example, in *Wilks v. Hom*, the plaintiff was using a vacuum cleaner in the living room. *Id.* at 1267, 3 Cal. Rptr. 2d at 804. She called out to her daughter to unplug the vacuum in her room and once she did, there was an immediate explosion. *Id.* The plaintiff was then thrown from the house due to the explosion. *Id.* She then went back into the house to retrieve her children and found the daughter severely injured in her room where the vacuum was originally plugged in at. The plaintiff did not visually witness the infliction of the injuries to her daughter, but she saw a bright flash erupt from her room as the explosion took place. *Id.* Because of this, the court still found that she contemporaneously perceived the injury-producing event. The plaintiff was "personally impressed' by the explosion at the same instant the damage was done to her child, and she instantly knew of the likely severe damage. *Id.* at 1273, 3 Cal. Rptr. 2d at 808.

The traumatic effect of mere observation of the aftermath of the injury-producing event is insufficient to support a right to relief based on bystander NEID. *Ra v. Superior Court*, 154 Cal. App. 4th 142, 64 Cal. Rptr. 3d 539 (2007). For example, in *Ra v. Superior Court*, the plaintiff was in a retail store shopping with her husband. *Id.* at 145 and 64 Cal. Rptr. 3d at 541. The plaintiff knew of her husband's general location immediately before the accident where he was subsequently injured by a falling sign. *Id.* She did not witness the sign hit her husband, but she heard "a loud bang" emanate from the area that her husband was in. *Id.* The sound startled the plaintiff and upon her turning around in the direction of the noise, she saw that her husband was holding his head in pain. *Id.* The plaintiff did not see the sign on the ground after looking at her husband and walking toward him and therefore was unaware that the sign caused the injury. *Id.* The court denied recovery on bystander NEID because the plaintiff could not establish a degree of certainty regarding her contemporaneous awareness of the causal connection between the injury-producing event and her husband's injuries. *Id.* at 152, 64 Cal. Rptr. 3d at 546.

In the present case, the plaintiff knew of his wife's location at the time of the injury-producing event. In *Krouse*, the plaintiff did not see his wife get hit but knew that his wife was near the rear end of their vehicle unloading groceries as the vehicle approached them. This knowledge allowed him to conclude his wife had been injured at the time the defendant's car made an impact with their car. Like the husband in *Krouse*, Mr. Robinson did not see the accident while on FaceTime, but he knew that his wife was traveling in her car on her way home on a two-lane highway. He heard his wife scream, "What the! He's crossing the center line, coming straight at me! Oh my God!", mere seconds before impact was made. Hearing this statement from his wife and the vivid sounds that followed, which were consistent with a car collision, Mr. Robinson could clearly and distinctly perceive that someone had crossed over into his wife's driving lane and made an impact with her car.

Mr. Robinson was "sensorially aware, in some important way" that his wife was being injured by the defendant's car. Visual perception of the accident and resulting injury is not required to sustain a claim for bystander NEID. The mother in *Wilks,* absent of seeing her daughter at the time, knew her daughter's location in the home, heard the explosion, and felt the impact of the injury-producing event, allowing her to create a causal connection between the event and the resulting injury. Similarly, Mr. Robinson knew that his wife was driving on a two-way road. He has also heard his wife yell out exactly what was occurring on her side of the phone prior to the impact being made. In addition, Mr. Robinson heard very distinct sounds of metallic crushing and an airbag deploying. After hearing his wife's statement and the sounds that followed, he understood the causal connection between the injury-producing event and the resulting injury at the time of the accident.

Finally, Mr. Robinson was contemporaneously aware that the defendant's conduct was causing his wife's injury at the time the accident occurred. Unlike the wife in *Ra,* who could not have known with *certainty* that her husband was injured by a falling sign after only hearing a loud bang, Mr. Robinson was certain that his wife had been in a car accident and was injured as a result. His wife's vivid description of the defendant crossing over into her lane, followed by the sound of the horn, metallic crushing sounds, and the airbags deploying, allowed Mr. Robinson to be sensorially aware, in some important way, that an accident had occurred. Furthermore, after calling out to his wife multiple times and not receiving any response, Mr. Robinson clearly and distinctly perceived the occurrence of an accident and his wife's resulting injury.

California courts have expanded their view on viable plaintiffs for bystander NEID because they recognize that someone can be entitled to recovery in many ways. Contemporaneous awareness requires that you must be sensorially aware that the injury-producing event is occurring. It does not require, however, that you see the event occurring. Contemporaneous awareness can be accomplished through sight or hearing when you are deemed to be virtually present. Both are not needed, and so long as you have had a quality, sensory experience of the injury-producing event and can make a causal connection between that and the resulting injury, you should be able to recover for bystander NEID.

Conclusion

On behalf of my client Mr. Robinson, I ask that the court deny the defendant's demurrer and allow the case to proceed to trial. At this stage, Mr. Robinson does not need to substantiate all facts supporting his claim of bystander NEID. Nevertheless, the present facts show that Mr. Robinson was indeed contemporaneously aware of the injury inflicted on his wife and therefore meets the necessary requirements for bystander NEID recovery in California.

Dated this 12th day of March 2022, in San Diego, California.

Angela Medcalf

_____

Angela Medcalf, Attorney for Plaintiff
Sherwood & Sherwood
9281 South Beach Drive
San Diego, California 92102
State Bar Number: 242589

Applicant Details

First Name	**Lawrence**
Last Name	**Myung**
Citizenship Status	**U. S. Citizen**
Email Address	**lawrencemyung@berkeley.edu**
Address	**Address** Street **8236 Golden Poppy Road** City **Riverside** State/Territory **California** Zip **92508** Country **United States**
Contact Phone Number	**9517560478**

Applicant Education

BA/BS From	**University of California-Los Angeles**
Date of BA/BS	**March 2021**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 8, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Berkeley Technology Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Chemerinsky, Erwin
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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

LAWRENCE MYUNG

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July 27th, 2023

The Honorable James O. Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am a rising 3L at Berkeley Law and I am writing to apply for a 2025-2026 clerkship with your chambers. I am interested in clerking, because I know that it will be a life-changing experience to get first-hand knowledge of the behind-the-scenes workings of our legal system. Most importantly, I know that the relationship between judges and law clerks can last a lifetime, which makes me eager for the chance to learn from your vast knowledge and experience.

As an aspiring attorney, I believe I would make a strong addition to your chambers. During my time at Berkeley Law, I have been particularly interested in the intersection between law and technology, from learning about the scope of intellectual property rights to advocating for an open internet for all. Throughout law school, I have also been committed to seeking out different perspectives, believing that the best outcome comes only after rigorous debate and an open mind. The breadth of my work experience, working for different stakeholders throughout the entire legal process, reflects a commitment to truly understand and promote different perspectives.

In addition to my work experiences, I have also cultivated a professional and accessible approach to legal research and writing under time sensitive conditions. At Berkeley Law, I was Dean Erwin Chemerinsky's full-time summer research assistant while my duties included analyzing and summarizing the entirety of the 2021-2022 Supreme Court Term for publication by the ABA in under three weeks. Throughout the school year, I continued being Dean Chemerinsky's research assistant in the fall and was a research assistant to Professor David Oppenheimer this past spring. I am also an Articles Editor for the Berkeley Technology Law Journal, which serves to cover emerging issues of technology and law. This year I have finished a fall field placement with FTC Commissioner Rebecca Slaughter's Office and was a member of the Samuelson Technology Law Clinic this past spring where I continued to hone my research and writing skills, from briefing cutting-edge competition and consumer protection issues to advocating for public-minded policy changes. These legal research and writing experiences have all made me appreciate and value the importance of accuracy, conciseness, and clarity.

My resume, transcript, recommendation letters, and writing sample are submitted with this application. If you are interested in learning more about me, then Dean Chemerinsky (510-642-1741), Professor Samuelson (510-338-3337), and Professor Taylor (415-216-6361) would be more than happy to attest to my dedication and intellectual curiosity. I would welcome the opportunity to interview with you and look forward to hearing from you soon.

Respectfully,
Lawrence Myung

LAWRENCE MYUNG

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EDUCATION

University of California, Berkeley, School of Law
Juris Doctorate Candidate, May 2024
Honors: Prosser Prize in Constitutional Law, Second-Year Academic Distinction (Top 33%)
Activities: Berkeley Law & Technology Journal (Articles Editor), Research Assistant to Professor David Oppenheimer, Ninth Judicial Circuit Historic Society: Effective Communication Across Differences Workshop (Participant)

University of California, Los Angeles
Bachelor of Arts*, magna cum laude,* in History (Social Thought Minor), March 2021
Honors: Highest Departmental Honors

EXPERIENCE

Summer Associate — San Francisco, CA
DLA Piper — May 2023-Present

Samuelson Law, Technology, & Public Policy Clinic — Berkeley, CA
Clinical Student — January 2023-May 2023
Worked directly with Author's Alliance on defending fair use against contractual override. Investigated existing research and scholarship. Recommended strategies to advocate public-minded copyright policy in the United States.

Federal Trade Commission — Washington D.C. (Remote)
Law Clerk to FTC Commissioner Rebecca Slaughter — September 2022-December 2022
Prepared vote recommendation memos on pending competition and consumer protection matters. Drafted public statements and opinions for the Commissioner. Conducted research on upcoming rulemaking on Data Surveillance, Online Endorsements, and Non-Compete Agreements.

University of California, Berkeley, School of Law — Berkeley, CA
Research Assistant to Dean Erwin Chemerinsky — May 2022-December 2022
Conducted research for Dean Chemerinsky's upcoming book on constitutional law called *Bad Bones*. Synthesized and briefed cases for a review of the 2021-2022 Supreme Court term by the ABA. Updated his constitutional law textbook.

WEBTOON Entertainment — Los Angeles, CA (Remote)
Brand Safety Research Intern — April 2021-July 2021
Reviewed original content in production for brand safety concerns on a global UGC (User-Generated Content) entertainment platform. Implemented updates to content policies and internet governance on topics including age-rating content, copyright infringement, community guideline violations, and internet censorship.

JusticeCorps (Dept. of Consumer and Business Affairs) — Los Angeles, CA
AmeriCorps Minimum Time Member — September 2019-March 2020
Worked with self-represented litigants through the small claims process. Educated litigants on legal options and potential outcomes. Served 200+ hours.

Los Angeles County District Attorney's Office-Hardcore Gang Division — Los Angeles, CA
Volunteer Student Worker — January 2019-June 2019
Analyzed and gathered case files in preparation for trial. Reviewed and compared transcripts against surveillance videos to ensure accuracy for trial.

HOBBIES & INTERESTS

Hiking, Cooking, Magic the Gathering, Romance Novels, etc.

Berkeley Law
University of California
Office of the Registrar

Lawrence Youngjae Myung
Student ID: 3032667978
Admit Term: 2021 Fall

Printed: 2023-06-09 09:30

Academic Program History
Major: Law (JD)

Awards

Prosser Prize 2022 Spr: Constitutional Law

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure Andrew Bradt	5.0	5.0	P
LAW	201	Torts Mark Gergen Stephen Sugarman	4.0	4.0	P
LAW	202.1A	Legal Research and Writing Urmila Taylor	3.0	3.0	CR
LAW	202F	Contracts Mark Gergen	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2022 Spring

Course		Description	Units	Law Units	Grade
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Urmila Taylor	2.0	2.0	P
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Erwin Chemerinsky	4.0	4.0	HH
LAW	230	Criminal Law Saira Mohamed	4.0	4.0	P
LAW	278	Copyrght,Comp, Tech Andrew Gass	1.0	1.0	CR
LAW	278.31	Copyright Law Pamela Samuelson	3.0	3.0	HH

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	30.0	30.0

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	241	Evidence Jonah Gelbach	4.0	4.0	H
LAW	275.3	Intellectual Property Law Robert Merges	4.0	4.0	H
LAW	295	Civ Field Placement Ethics Sem **Fulfills Either Prof. Resp. or Experiential** Susan Schechter Jessica Mark Cheryl Stevens	2.0	2.0	HH
LAW	295.6A	Civil Field Placement **Units Count Toward Experiential Requirement** Susan Schechter	4.0	4.0	CR
LAW	297	Self-Tutorial Sem Erwin Chemerinsky	2.0	2.0	CR

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	46.0	46.0

Carol Rachwald, Registrar

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Berkeley Law
University of California
Office of the Registrar

Lawrence Youngjae Myung
Student ID: 3032667978
Admit Term: 2021 Fall

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	250	Business Associations Adam Badawi	4.0	4.0	P
LAW	278.1	Trademark Law Sonia Katyal	3.0	3.0	H
LAW	285.9	Samuelson Clinic Seminar Jennifer Urban Erik Stallman Areeba Jibril Megan Graham	2.0	2.0	CR
LAW	295.1M	Berk Tech Law Journ Kathleen Vanden Heuvel	1.0	1.0	CR
LAW	295.5T	Samuelson Clinic **Fulfills Writing Requirement** Jennifer Urban Erik Stallman Brianna Schofield Areeba Jibril Megan Graham	4.0	4.0	CR
LAW	297	Self-Tutorial Sem David Oppenheimer	2.0	2.0	CR

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	62.0	62.0

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	220.43	Constitutional Interpretation John Yoo Steven Hayward Janice Brown	1.0	1.0	
LAW	220.9	First Amendment Erwin Chemerinsky	3.0	3.0	
LAW	231	Crim Procedure-Investigations **Units Count Toward Race and Law Requirement** Andrea Roth	4.0	4.0	
LAW	276.32	Topics in Privacy&Security Law **Fulfills 1 of 2 Writing Requirements** Paul Schwartz	3.0	3.0	
LAW	278.75	Enter. Law in the TV Industry **Units Count Toward Experiential Requirement** Rafael Gomez	1.0	1.0	

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	62.0	62.0

Carol Rachwald, Registrar

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University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

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University of California, Los Angeles
UNDERGRADUATE Student Copy Transcript Report

Student Information

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Program of Study

Admit Date: 09/25/2017
COLLEGE OF LETTERS AND SCIENCE

Major:
HISTORY

Minor:
SOCIAL THOUGHT

Degrees | Certificates Awarded

BACHELOR OF ARTS Awarded March 19, 2021
in HISTORY
With Departmental Highest Honors Awarded
With a Minor in SOCIAL THOUGHT
Magna Cum Laude

Secondary School

JOHN W NORTH HIGH SCHOOL, June 2017

University Requirements

Entry Level Writing	satisfied
American History & Institutions	satisfied

California Residence Status

Resident

Transfer Credit

Institution		Psd
ADVANCED PLACEMENT	1 Term to 10/2017	44.0
INTERNATIONAL BACCALAUREATE	1 Term to 10/2017	16.0

Fall Quarter 2017

Major:
BIOCHEMISTRY

CHEMICAL STRUCTURE	CHEM 20A	4.0	12.0	B
AMERICA 1954-1974	CLUSTER 60A	6.0	19.8	B+
DIFF&INTGL CALCULUS	MATH 31A	4.0	13.2	B+

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	45.0	3.214

Winter Quarter 2018

AMERICA 1954-1974	CLUSTER 60B	6.0	24.0	A
WESTERN CIVILIZATN	HIST 1B	5.0	20.0	A
WRLD HIST 1760-PRES	HIST 22	5.0	20.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	64.0	4.000

Spring Quarter 2018

US TRENDS 1960-NOW	CLUSTER 60CW	6.0	22.2	A-
Honors Content Writing Intensive				
WRLD HIST TO AD 600	HIST 20	5.0	20.0	A+
EUROPEAN HISTORY	HIST 97C	4.0	16.0	A
HMN PHYS-DIET&EXRCS	PHYSCI 5	5.0	20.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	20.0	20.0	78.2	3.910

Fall Quarter 2018

Major:
HISTORY

STUDENT RSRCH PRGRM Honors Content	COMM 99	1.0	0.0	P
ASTROBIOLOGY	EPS SCI 3	5.0	20.0	A+
RVLTNRY RUSSIA&USSR	HIST 127C	4.0	16.0	A
NEOLIBERALISM	HIST 12B	5.0	20.0	A+
INDIA	HIST 9A	5.0	20.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	20.0	20.0	76.0	4.000

Winter Quarter 2019

EUR-CUL&INTELL-19C	ART HIS M127C	4.0	16.0	A+
STUDENT RSRCH PRGRM Honors Content	COMM 99	1.0	0.0	P
U S SINCE 1960	HIST 140C	4.0	16.0	A
HIST INTRO TO PHIL	PHILOS 3	5.0	20.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	52.0	4.000

Spring Quarter 2019

DINOSAURS&RELATIVES	EPS SCI 17	5.0	20.0	A+
INTELLECTL HIST US	HIST 142B	4.0	16.0	A
INTRO AFRO-AMER HIS	HIST M150C	4.0	16.0	A+
STUDENT RSRCH PRGRM Honors Content	MGMT 99	1.0	0.0	P

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	52.0	4.000

Fall Quarter 2019

MID EAST 500-1300	HIST 105A	4.0	16.0	A
US ECON-1790-1910	HIST 141A	4.0	16.0	A+
INDIV STD FOR USIE	HIST 188SA	1.0	4.0	A
LEADING UGRAD SEM Honors Content	HNRS 101E	1.0	0.0	P
INTR-POLITCL THEORY	POL SCI 10	5.0	20.0	A+
ELEMENTARY SPANISH	SPAN 1	4.0	0.0	P

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	19.0	19.0	56.0	4.000

Winter Quarter 2020

COMM&CORPRAT INTERN	CESC 195CE	4.0	16.0	A
CHINESE OVERSEAS	HIST 170B	4.0	16.0	A
INDIV STD FOR USIE	HIST 188SB	1.0	4.0	A
LEADING UGRAD SEM Honors Content	HNRS 101E	1.0	0.0	P
ANARCHSM&UTOPIANSM	PHILOS C156	4.0	16.0	A
ELEMENTARY SPANISH	SPAN 2	4.0	0.0	P

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	18.0	18.0	52.0	4.000

Spring Quarter 2020

INDIV STD FOR USIE	HIST 188SC	2.0	8.0	A
HONORS RESEARCH Honors Content	HIST 198A	4.0	16.0	A
DEVELPMT SOC THEORY	SOCIOL 101	5.0	20.0	A
ELEMENTARY SPANISH	SPAN 3	4.0	14.8	A-

Due to the COVID-19 pandemic, Passed/ Not Passed grading permitted for many classes and degree requirements.

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	15.0	15.0	58.8	3.920

Fall Quarter 2020

HONORS RESEARCH	HIST 198B	4.0	0.0	IP
Honors Content Multiple Term - In Progress				
GREAT COMPOSER UCLA	MUSC 19	1.0	0.0	P
Honors Content				
INTRO-POLITICL PHIL	PHILOS 6	5.0	20.0	A
RESEARCH COLLOQ I	SOC THT 190A	2.0	0.0	P
DIRECTED RESEARCH I	SOC THT 199A	4.0	16.0	A

Due to the COVID-19 pandemic, Passed/ Not Passed grading permitted for many classes and degree requirements.

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	36.0	4.000

Winter Quarter 2021

HONORS RESEARCH	HIST 198C	8.0	32.0	A
Honors Content End of Multiple Term Course				
RESEARCH COLLOQ II	SOC THT 190B	2.0	0.0	P
DIRECTED RESRCH II	SOC THT 199B	4.0	16.0	A
COVID 19 MOURNING	SOCIOL 19	1.0	0.0	P
Honors Content				
NNVLNC&WMN SLF-DFNS	UG-LAW 19	1.0	0.0	P
Honors Content				

Due to the COVID-19 pandemic, Passed/ Not Passed grading permitted for many classes and degree requirements.

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	48.0	4.000

UNDERGRADUATE Totals

	Atm	Psd	Pts	GPA
Pass/No Pass Total	20.0	20.0	N/a	N/a
Graded Total	158.0	158.0	N/a	N/a
Cumulative Total	178.0	178.0	618.0	3.911

Total Non-UC Transfer Credit Accepted	60.0
Total Completed Units	238.0

END OF RECORD
NO ENTRIES BELOW THIS LINE

May 20, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am writing to very highly recommend Mr. Lawrence Myung for a position as your law clerk. Mr. Myung was a student in my Constitutional Law class, where he received an award for the second highest grade in a class of 200 students. He also was my research assistant in the summer and fall of 2022. He did a superb job. Simply put, I never have had a better research assistant in 43 years as a law professor.

As my research assistant, Mr. Myung worked on a number of projects for me. He worked with remarkable speed and tremendous effectiveness. For example, I wrote a short book on the Supreme Court's October 2021 term. I had three research assistants and asked them to edit chapters and complete footnotes. Mr. Myung did more chapters than the other two research assistants combined by a substantial amount and did the work superbly. Likewise, I had these research assistants work on the new edition of my Constitutional Law treatise. Mr. Myung's work was the best I ever have seen in editing and offering suggestions, and again he did much more than the other two students combined.

Every research project was completed on time and with superb work. His memos on research topics were thorough and very well written. One project was to summarize the literature on the impact of the Supreme Court's decision in Citizens United v. Federal Election Commission. He did a terrific job of describing and presenting the studies that have been done on its impact.

I have no doubt he will be a superb law clerk. He is exceptionally smart. His exam in my class was truly outstanding, as reflected by it being at the top of a class of 200 students. He has great research skills and is an excellent writer. He works with great efficiency and minimal supervision but knows when to ask for assistance. And he is truly a pleasure to work with.

Mr. Myung is one of the best students I ever have had and I recommend him to you with great enthusiasm.

Sincerely,

Erwin Chemerinsky

Erwin Chemerinsky - echemerinsky@law.berkeley.edu - 5106426483

April 27, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Re: Clerkship Application of Lawrence Myung

Dear Judge Browning:

I am writing to offer an enthusiastic recommendation of Lawrence Myung as a clerk in your chambers. I got to know Mr. Myung quite well when he took my copyright class last spring. He and I spent numerous hours talking about copyright issues—not only the ones that we were studying in class, but also issues he'd spotted in news articles and the like (e.g., whether AI-generated works are copyrightable), issues on which I was working, and issues that were likely to be addressed by Congress. He is among the most intellectually curious students I've had in the past five year. He is, moreover, both a well-spoken young man and an excellent writer and legal analyst.

Every year I give students in my copyright class not only a final exam but also two ungraded written assignments (200-500 words in length) on challenging questions pending in the courts to gauge how well they are "getting" concepts about which I'm teaching. In response to both assignments, Mr. Myung gave truly excellent answers. I thought it might be useful to you to see my comments on the two assignments so you can see the kinds of insights and analysis his writings displayed, which are relevant to his qualifications to be selected as your clerk.

The first assignment was to predict the implications of the Supreme Court's decision in Georgia v. PublicResource.Org, the annotations to the Official Code of Georgia were unprotectable government edicts, that would have for a similar case like ASTM v. PublicResource.Org. ASTM sued PRO, a nonprofit organization whose mission is to make "the law" publicly available for free, for copyright infringement because it posted on a public website numerous ASTM standards documents that legislatures had adopted as the law of their jurisdictions. The rationale that the Court gave for deciding the Georgia case (the state's involvement in making the annotations meant that Georgia was the annotations' author and under some older cases, state authorship of legal materials makes them unprotectable by copyright law) would not help PRO in the ASTM case. Yet Georgia also said that "no one can own the law." I asked about Georgia's implications for whether the ASTM standards-adopted-as-laws were government edicts.

> I like that you dug into the facts of ASTM rather than just relying on the summary that I provided. It's a good point that govt employees often participate in standard setting and that may affect how the courts should look at copyright claims when ASTM sues PRO. I like the legislative delegation point and the hypothetical at the end. Lobbyists often draft things and hand them to legislators to introduce as bills. It would make no sense to say that the lobbyists owned copyright in such bills. It's also a good point that ordinary people, and not just professional contractors, should be able to get access to codes that are supposed to protect them from fire etc. No one can own the law is a powerful norm.

The second writing assignment was to predict how the Supreme Court's analysis of fair use in its decision that Google had not infringed Oracle copyrights by reimplementing parts of the Java application program interface in its Android smartphone software would affect how the Second Circuit should view whether Andy Warhol's use of parts of a photograph of Prince to make very different artistic prints of that musician was fair use or an infringement of the photographer's copyright. A lower court had ruled in Warhol's favor. But a Second Circuit panel reversed. (The question of whether the Warhol works are transformative and hence likely fair uses is currently before the Supreme Court.)

> The GvO reference to the artistic painting of a copyrighted logo as fair use does very much suggest that GvO is not just a SW fair use case. Breyer was sending a signal. You tie this very nicely to the way in which W's use of G's photo has a transformative character as expressive art. The recognizable foundation approach in the 2d Cir decision certainly is at odds with this. As you note, sometimes an existing work as a foundation is necessary to achieve an artistic purpose. WFvG is a bit different than Campbell, though, in that G's photo was not published or an iconic work on which W was commenting. You note the differences between W's print and the photo. What exactly is expressive in G's photo and how much of that expression is (and is not) evident in W's print. G's lawyer did a good job in persuading the panel of the analogy of a movie made from a novel, but as you say, W's print and G's photo are not telling the same story.

When I asked him to send me a more recent writing sample so I could consider it as I prepared to write this letter, Mr. Myung shared with me a 10 page memo he wrote while working as an RA for Dean Chemerinsky. This memo too shows a clarity of mind, an ability to convey important concepts and analyze them succinctly and lucidly.

Also impressive is his service as a law clerk to an FTC Commissioner, his work as an Articles Editor of the Berkeley Technology Law Journal, his engagement with the Samuelson Law, Technology, & Public Policy clinic, and his participation in other student groups. Someone who does this much, plus serving as an RA for the dean, is someone who manages time well. He is, moreover, a very respectful and personable young man.

I have no reservations about recommending Mr. Myung for this clerkship.

Pamela Samuelson - pam@law.berkeley.edu

Sincerely,

Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law
Berkeley Law School

Pamela Samuelson - pam@law.berkeley.edu

March 1, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

RE: Lawrence Myung

Dear Judge Browning:

I recommend Lawrence Myung for a judicial clerkship in your chambers.

I teach Legal Research and Writing (fall) and Written and Oral Advocacy (spring) at Berkeley Law School and had Lawrence as my student during his 1L year. He was a successful student, consistently producing well-reasoned and polished work. He is an efficient researcher, quick learner, and accomplished writer. He also is hardworking, demonstrating initiative and an ability to get things done. I believe he has the traits necessary to be a successful law clerk and that he would be a positive addition to your chambers.

While he was my student, Lawrence showed himself to be a nimble thinker and an efficient researcher. He quickly understood each of the various substantive problems he analyzed in my classes, even as those problems became more complex. He located the key cases for each problem and correctly interpreted those cases to understand their significance. Finally, Lawrence effectively used the cases he selected. In the spring, he framed the cases in his final brief accurately but persuasively to support his client's position in a copyright infringement case, demonstrating both his creativity as an advocate and his caution never to overstate or misstate the law. I believe that Lawrence has the research and analytical skills necessary to be an effective judicial clerk.

In addition, Lawrence is a strong legal writer. Lawrence worked very hard to improve his legal writing, and frequently came to office hours to seek my guidance. More importantly, he successfully implemented the feedback and strategies I suggested. I was consistently impressed by his ability to transfer the lessons he learned from one project to the next. Simply put, Lawrence is highly coachable. Moreover, he can work well under considerable pressure; despite needing to travel home for his grandmother's funeral, Lawrence nonetheless timely submitted his final appellate brief to me (drafting portions of it on the plane, no less). Lawrence absolutely exemplifies the resilience and perseverance, that are necessary for students to succeed. I predict that he will continue to succeed when facing new and unfamiliar challenges throughout his career.

I also have been impressed by Lawrence's ability to work effectively with others. In both my classes, I require students to work together on various projects. Lawrence consistently worked successfully in these groups, contributing his ideas and thinking while also soliciting ideas from others. He brings such a wonderful level of authenticity, enthusiasm, and engagement to everything he does, and it positively influences those around him.

And finally, I have really enjoyed getting to know Lawrence and learning about his career goals and aspirations. Lawrence arrived at law school already knowing how to work hard, and with an appreciation of the opportunities a law degree can provide. Lawrence was always engaged in class, arriving early, staying late, and providing useful contributions to class discussions. During our conversations outside of class, I have found Lawrence to be ambitious and hardworking, but also easygoing, likable, and a pleasure to chat with.

Given his strong skills, drive, and motivation, I absolutely recommend Lawrence for a clerkship. Please feel free to contact me if you have any questions, or if I can provide any further information.

Sincerely,

Urmila R. Taylor
Professor of Legal Writing
Legal Research, Analysis, and Writing Program
University of California, Berkeley School of Law

Urmila Taylor - utaylor@berkeley.edu - 510-642-1928

This memo was typical of my work with Dean Erwin Chemerinsky. For this assignment, I was tasked with summarizing recent Alaskan constitutional law decisions for a talk he would be giving on the topic. The vast majority of this memo was completed in less than a week with minor polishes. The research, analysis, and writing are entirely my own.

Alaska Supreme Court Cases (2021-2022)

INTRODUCTION

For the past few years, the COVID-19 pandemic has left the nation in a state of uncertainty. In response, state courts have had to find innovative solutions to continue guaranteeing justice. The Alaska Supreme Court has made several key rulings regarding the COVID-19 pandemic and the 2020 election. At the same time, the judiciary has never been under greater scrutiny. The Alaska Constitution, like all state constitutions, can and does protect further rights than the U.S. Constitution. The Alaska Supreme Court will surely continue to play a huge role in adjudicating these rights. During its most recent term, the Alaska Supreme Court has issued several key rulings on election law and civil rights.

1. Election Law

State v. Arctic Vill. Council, 495 P.3d 313 (Alaska 2021)

The Alaska Supreme Court held that the State's interest in maintaining the witness requirement for absentee votes was outweighed by the burden that the requirement would impose on the right to vote during times of community lockdowns and strict limits on person-to-person contact.[1] About two months before the 2020 general election, the Artic Village Council, a village government, and other

[1] State v. Arctic Vill. Council, 495 P.3d 313, 315 (Alaska 2021).

individuals sought to enjoin the State from enforcing a statue that requires absentee ballots to be witnessed by an official or other adult. At the time, the federally recognized tribal government was taking strict measures to control the spread of the virus, including a community-wide shelter in place.[2] They argued that, under the unusual circumstances posed by the COVID-19 pandemic, the witness requirement for absentee voting unconstitutionally burdened the right to vote.

Alaska has a four-part balancing test for assessing an election law's constitutionality under the Alaska constitution: (1) When an election law is challenged the court must first determine whether the claimant has in fact asserted a constitutionally protected right (2) If so they must then assess "the character and magnitude of the asserted injury to the rights" (3) Next, they weigh the precise interests put forward by the State as justifications for the burden imposed by its rule (4) and judge the fit between the challenged legislation and the State's interests in order to determine "the extent to which those interests make it necessary to burden the plaintiff's rights."[3] They have further ruled that "substantial burdens require compelling [State] interests narrowly tailored to minimally infringe on the right."[4]

The Alaska Supreme Court found in favor for the plaintiffs. Neither side disputed that plaintiffs have the constitutionally protected right to vote absentee. The Court found that there was a severe burden on plaintiffs' fundamental right to

[2] *Id.* at 317.
[3] *Id.* at 321 (internal citations omitted).
[4] *Id.* at 322 (quoting O'Callaghan v. State, 914 P.2d 1250, 1254 (1996)).

vote, because the witness requirement forces voters to choose between risking their health or forgoing their right to vote entirely. They dismissed the state's proposed alternative of making voters sign inside while a witness watched outside through a window or signing a ballot many feet away from the observing witnesses.[5] Instead, they recognized that many people lived alone and the limited medical resources many plaintiffs had.[6] Admittedly, the Court did find the State's interest in "deterring voter fraud" legitimate and compelling in the abstract, but found that it did not justify the substantial burden on the right to vote.[7] The State could not provide any examples where the witness requirement played a role in detecting fraud. Therefore, the Court upheld the enjoinment of the witness requirement in 2020.

Pruitt v. Off. Of Lieutenant Governor, 498 P.3d 591 (Alaska 2021)

In 2020, Democratic challenger Liz Snyder beat state Rep. Lance Pruitt by a mere 11 votes. Pruitt brought an election contest challenging the result while the Alaska Supreme Court granted review on whether the Divisions of Elections committed "malconduct" that influenced the election by moving a polling place without notifying the public in all the ways required by law. Appellant offered testimony of one voter who was frustrated by the polling place change and ultimately didn't vote, because by the time she found the new polling place "many,

[5] The Division of Elections said that a local official offered to go door-to-door on his patrols to offer the opportunity to vote absentee. *Id.* at 318.
[6] In the Artic village, 50 of 150 residents lived alone and the nearest hospital was 233 air miles away. *Id.* at 317.
[7] *Id.* at 324-25.

many, many people were there" and she'd "never make" her 10:00 appointment.[8] The Alaska Supreme Court found that the appellant failed on the merits and that the Division of Elections did not commit malconduct.

State v. Galvin, 491 P.3d 325 (Alaska 2021)

Alyse Galvin was an Alaska Democratic Party nominee for office but registered as a nonpartisan voter. She sued to stop the state Division of Elections from sending out already-printed ballots for the 2020 general election, arguing that an incorrect ballot infringed on her right to free political association.[9] The Alaskan Division of Elections alleged that it would have to reprint 800,000 ballots on a tight timeline, which could infringe the public's interest in an orderly election.

Ultimately, the Alaska Supreme Court found that the Division didn't burden Galvin's constitutional right of political association, because she could still express her identity as a nonpartisan voter in other ways.[10] The Supreme Court of Alaska held that granting Galvin's requested injunction would have jeopardized the prospects of a successful and timely election. On the other hand, the dissent argued that there was also a public interest in a proper ballet and pointed to the lack of proof that the ballot couldn't be timely corrected.[11]

State v. Recall Dunleavy, 491 P.3d 343 (Alaska 2021)

[8] Pruitt v. Off. Of Lieutenant Governor, 498 P.3d 591, 596 (Alaska 2021).
[9] State v. Galvin, 491 P.3d 325, 328 (Alaska 2021).
[10] *Id.* at 335.
[11] *Id.* at 343 (Maassen, J., dissenting) (Alaska 2021).

A recall committee applied to the Alaska Division of Elections seeking to recall the governor, citing lack of fitness, incompetence, and neglect of duties. Their recall is based on four allegations based on misuse and mishandling of power. The director denied certification of their application, citing that "the statements of grounds for recall [was] not factually and legally sufficient for purposes of certification."[12] The Supreme Court of Alaska found that the recall application satisfied the legal sufficient and particularity requirements for presentation to the voters. Meanwhile, the dissent disagrees on two of the recall's allegations, pertaining to the governor's exercise of constitutional authority to veto certain appropriations by the legislature as legally sufficient.[13]

Res. Dev. Council for Alaska, Inc. v. Vote Yes for Alaska's Fair Share, 494 P.3d 541 (Alaska 2021)

Entities sued over the lieutenant governor's decision that the sponsors of an initiative had collected enough signatures to allow the initiative to appear on the ballot in the 2020 general election, because the circulators had falsely certified that their compensation compiled with Alaska election law. The statue governing circulator compensation allows them to be paid no more than "$1 a signature."[14] The Supreme Court of Alaska relied on the Supreme Court's exacting scrutiny framework in *Meyer v. Grant*, requiring the State to demonstrate a sufficiently important interest and employ means closely drawn to avoid unnecessary

[12] *See* AS 15.45.550(1) (listing basis for denial of certification).
[13] State v. Recall Dunleavy, 491 P.3d 343, 372 (Stowers, J., dissenting) (Alaska 2021).
[14] Alaska Statues 15.45.110.

abridgement of freedoms.[15] A hard cap of $1 a signature was found to significantly inhibit communication about proposed political change, especially given the state's spread-out geography.[16] The State did have a compelling interest in fighting fraud, but the statue was ruled to not be narrowly tailored. Therefore, the court held that this was an unconstitutional restriction on core political speech, which meant that the lieutenant governor did properly certify the petition.

State v. Vote Yes for Alaska's Fair Share, 478 P.3d 679 (Alaska 2021)

Sponsors of an initiative on the ballot sought declaratory judgment that the lieutenant governor's initiative ballot summary was not true and impartial. The Supreme Court of Alaska held that the ballot summary's statement that "This Would Mean The Normal Public Records Act Process Would Apply" was an inaccurate and misleading statement.[17] They stated that how the Public Records Act does or does not apply is unclear and not within the authority of the lieutenant governor or Division of Election to determine. The Supreme Court of Alaska did allow the lieutenant governor to partially revise the ballot summary in accordance with their decision.

Jones v. Biggs, 508 P.3d 1121 (Alaska 2022)

An Alaska citizen filed an application for a petition to recall a member of the Anchorage Assembly, alleging that the assembly member had committed

[15] Res. Dev. Council for Alaska, Inc. v. Vote Yes for Alaska's Fair Share, 494 P.3d 541, 551 (Alaska 2021).
[16] *Id.* at 552.
[17] State v. Vote Yes for Alaska's Fair Share, 478 P.3d 679 (Alaska 2021).

misconduct in office by participating in an indoor gathering of more than 15 people in violation of an executive order. The municipal clerk rejected the application after concluding that the alleged conduct did not constitute misconduct in office, which was reversed by the superior court. The Supreme Court of Alaska affirmed the reversal of the clerk's denial, stating that "misconduct in office" should be liberally construed so that the people are permitted to vote and express their will.[18]

Alaska Pub. Offs. Comm'n v. Patrick, 494 P.3d 53 (Alaska 2021), cert. denied, 211 L. Ed. 2d 486, 142 S. Ct. 779 (2022)

In 2012, the Alaska Public Offices Commission (APOC) issued an advisory opinion stating that the contribution limits in Alaska's campaign finance law are unconstitutional as applied to contributions to independent expenditure groups considering *Citizens United*. In 2018, three individuals filed complaints with APOC alleging that independent expenditure groups had exceeded Alaska's contribution limits. The individuals appealed to the superior court, which reversed APOC's dismissal of the complaints based on the expert opinion of "Patrick" and a recent 9th Circuit of Appeals decision (since struck down).[19] The Supreme Court of Alaska reversed because of the overwhelming evidence based on other decisions.

Civil Rights

Rosemarie P. v. Kelly B., 504 P.3d 260 (Alaska 2021)

[18] Jones v. Biggs, 508 P.3d 1121, 1124 (Alaska 2022) (citations omitted).
[19] Alaska Pub. Offs. Comm'n v. Patrick, 494 P.3d 53, 56 (Alaska 2021), cert. denied, 211 L. Ed. 2d 486, 142 S. Ct. 779 (2022).

In an opinion by Chief Justice Winfree, the court ruled that two Alaska women will share custody of their son, after the biological mother lost her court fight for sole custody. The Court held that the mother's former partner was the child's psychological parent and that sole custody with biological mother would be detrimental to child. However, it did not address whether Alaska's legitimation statue allows superior courts to adjudicate whether women – especially those in same sex relationships – were non-biological parents, calling on the Alaska legislature to fix the potential constitutional issues raised by current statue.[20] The decision was the first of its kind in Alaska involving a same-sex couple.

Sagoonick v. State, 503 P.3d 777 (Alaska 2022), reh'g denied (Feb. 25, 2022)

Several young Alaskans sued the state, alleging that its resource development was contributing to climate change and adversely affecting their lives. They sought declaratory and injunctive relief based on allegations that the state, through existing policies and past actions, violated both the constitutional natural resources provisions[21] and their individual rights. The Alaska Supreme Court concluded that the superior court correctly dismissed their lawsuit, because the injunctive relief claims presented were non-justiciable political decisions.

Article VIII, section 1 of the Alaska Constitution states that "[i]t is the policy of the State to encourage the settlement of its lands and the development of its

[20] Rosemarie P. v. Kelly B., 504 P.3d 260, 268 (Alaska 2021).
[21] "The [natural resources] article's primary purpose is to balance maximum use of natural resources with their continued availability to future generations." *See West v. State, Bd. of Game*, 248 P.3d 689, 696 (Alaska 2010).

resources by making them available for maximum use consistent with the public interest."[22] Meanwhile, Article VIII, section 2, commands the legislature "to provide for the utilization, development, and conservation of all natural resources belonging to the State."[23] The plaintiffs, including many Alaska Natives, talked about how the state's policies have exacerbated climate change, citing specific harms on "their recreational opportunities, diet, physical and mental health, and traditional cultural activities."[24] They not only argued for specific carbon emissions standards and policies, but that they have a "fundamental and inalienable constitutional right[] to…a stable climate system that sustain human life and liberty."[25]

The Alaska Supreme Court found that the political question doctrine prevented them from judicially enforceable standards, which ultimately means that "declaring the existence or even violation of plaintiff's various purported constitutional rights would not settle the parties' legal relations."[26] However, the dissent argued that the Alaska Supreme Court should have "explicitly recognize[d] a constitutional right to a livable climate – arguably the bare minimum when it comes to the inherent rights to which the Alaska Constitution is dedicated."[27] Justice Maassen concludes that "[a] declaratory judgment [recognizing individual Alaskans' constitutional right to a livable climate] would be an admittedly small

[22] Alaska Const. art. VIII, § 1.
[23] Alaska Const. art. VIII, § 2.
[24] Sagoonick v. State, 503 P.3d 777, 790 (Alaska 2022), reh'g denied (Feb. 25, 2022).
[25] *Id.* at 791.
[26] *Id.* at 801.
[27] *Id.* at 805 (Maassen, J., dissenting).

step in the daunting project of focusing governmental response to this existential crisis. But it is a step we can and should take."[28]

This is the second case in the last six years, in which the Alaska Supreme Court has been called upon to recognize this constitutional right. As the issue of climate change continues to be politicized, this will not be the last case about climate change before this court.

CONCLUSION

During the past few years, the Alaska Supreme Court has had to rule on a variety of novel issues, particularly navigating the 2020 election during the COVID-19 pandemic. Looking to the future, the law is undeniably undergoing a period of rapid change. In November, the Supreme Court is hearing arguments about the constitutionality of the Indian Child Welfare Act (ICWA). Alaska has a large indigenous population, and the Supreme Court of Alaska has already ruled on three cases regarding the ICWA in 2022 alone.[29] If the independent legislature theory is adopted in *Merrill v. Milligan*, then there might not be state judicial review over political gerrymandering. The Alaska Supreme Court just recently upheld an order that found unconstitutional political gerrymandering in Anchorage. Nevertheless, the Supreme Court of Alaska will continue playing a large role in protecting the rights of Alaskans.

[28] *Id.* at 811.
[29] At least 15.7% of Alaskans identify as American Indian or Alaska Native in the latest Census. *See Quick Facts: Alaska*, Census.gov, https://www.census.gov/quickfacts/AK#qf-headnote-a.

This paper was written for Trademark Law, in which I analyzed a real-life example of a trademark that raises freedom of speech implications. This memo is not meant to be exhaustive but instead applies the general principles of the course. The research, analysis, and writing are entirely my own.

MEMORANDUM

INTRODUCTION

The California Law Review ("CLR") is Berkeley Law's flagship law journal, originally being founded in 1912 as the first student law journal in the Western United States. From its inception, the California Law Review was seen by its creators "as a vehicle for reform" while it has continuously published cutting-edge legal scholarship and produced future legal leaders for over a century.[1] The California Lawn Review ("Lawn") directly parodies CLR, calling itself "the preeminent student-run horticultural publication."[2] It is a satirical magazine that publishes everything from creative writing works to critiques on legal education. If CLR sought to sue Lawn for trademark infringement, then Lawn would be protected by the First Amendment.

I. Trademark Infringement Claims

1. CLR will likely succeed in proving the likelihood of confusion.

Under the Lanham Act, trademark infringement includes the usage of trademarks in commerce by unauthorized parties "in which connection with such use is likely to cause confusion."[3] Lawn's distribution of its magazine on campus, in conjunction with its website and social media presence, likely constitutes a use in commerce. The likelihood of confusion test depends on the circuit, but generally looks at the alleged infringer's intent, actual confusion, and other "market factors."[4] For the purposes of this memo, the likelihood of confusion test will be based on six factors: (1) similarity, (2) strength, (3) relatedness, (4) defendant's intent, (5) actual confusion, (6) purchaser care/sophistication.

[1] "About," CAL. L. REV., https://californialawreview.org/about/.
[2] "Welcome, Touch Grass," CAL. LAWN REV., https://californialawnreview.org/.
[3] *See* Lanham Act, 15 U.S.C. § 32(1)(A) (2018).
[4] GRAEME DINWOODIE & MARK JANIS, TRADEMARKS AND UNFAIR COMPETITION 583 (6th ed. 2022).

a. Likelihood of Confusion (Initial Interest Confusion)

i. Similarity

Similarity looks at sight, sound, and meaning to assess the degree of similarity between two marks. In this case, the two marks are incredibly similar, differing by a single letter – law vs. lawn. Lawn has made multiple posts admitting the similarity between the two marks, particularly how they are likely to cause consumer confusion.[5] There are slight differences in color schemes and logos, but these differences would likely be seen as minor.[6] For example, CLR has a gold font while Lawn has gold font contrasted with a dark green "Lawn." Additionally, Lawn has an insignia of grass compared to CLR's insignia of an open book. However, the court ruled in *Virgin Enterprises Ltd. v. Nawab* that the different typeface and colors of the word "Virgin" were "trivial and often irrelevant differences," ruling that the marks were still sufficiently similar.[7] Therefore, the court would likely rule in favor of CLR, finding that the marks are sufficiently similar and could increase the likelihood of confusion.

ii. Strength of the Mark

The strength of a trademark is determined by both a mark's "inherent distinctiveness" and "acquired distinctiveness."[8] Inherently distinctive marks are marks that are arbitrary or fanciful in relation to the goods or services on which they are used.[9] CLR's mark is likely descriptive, because it merely describes the location (California) and service (law review).[10] Just like a merchant cannot trademark PENCILS for their pencil business, CLR cannot trademark

[5] *See* Section (I)(1)(a)(iv).
[6] *See* Exhibit A & B.
[7] 335 F.3d 141, 149 (2d Cir. 2003).
[8] *Id.* at 147.
[9] Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976).
[10] There is some ambiguity whether the addition of California to law review is enough to make the mark suggestive, but this is still not enough to make it inherently distinctive.

LAW REVIEW for their law review.[11] Meanwhile, a mark has "acquired distinctiveness" when usage of the mark in commerce has resulted in a high degree of consumer recognition.[12] CLR is famous for its legal scholarship, being the 5th highest ranked law review.[13] Additionally, CLR's alumni include law professors, high-ranking government officials, judges, and famous legal advocates. Ultimately, a court could rule either for CLR or Lawn on the strength of the mark.

iii. Relatedness

Relatedness looks at the proximity of the service being sold by the plaintiff and the defendant.[14] The closer the services are to one another, the more likely that the consumer will be confused. There is some overlap between the two publications, because both offer a platform for students to critique legal education and professionalism. In April 2022, the Lawn published a student note called "The Bluebook is a Scam (And Not Just Because I Always Failed Citation Machine Exercise" by @earlwarrenbaddie69, which critiqued the Bluebook as antiquated and inefficient.[15] Although it would be different in style and length, the CLR could conceivably publish a similar student note. However, CLR is unlikely to begin producing humorous or satirical pieces akin to Lawn. For example, some federal judges would certainly boycott Berkeley Law for prospective clerkships if its flagship law review published satirical articles such as the Lawn's "FedSoc Brings Literal Devil to Campus for Lunch Talk."[16] Therefore, it is

[11] Virgin Enterprises Ltd. v. Nawab, 335 F.3d at 147.
[12] TCPIP Holding Co. v. Haar Communications Inc., 244 F.3d 88, 100.
[13] Bryce C. Newell, "Law Journal Meta-Ranking, 2022 Edition," UNIV. OF OR., https://blogs.uoregon.edu/bcnewell/meta-ranking/.
[14] Virgin Enterprises Ltd. v. Nawab, 335 F.3d at 149.
[15] @EarlWarrenBaddie69, "The Bluebook is a Scam (And Not Just Because I Always Failed Citation Machine Exercise,"1 CAL. LAWN REV. II, 8-9, https://californialawnreview.org/2022/07/06/clr-volume-i-issue-ii/.
[16] "FedSoc Brings Literal Devil to Campus for Lunch Talk," CAL. LAWN REV. (Jan. 6, 2023), https://californialawnreview.org/2023/01/06/fedsoc-brings-literal-devil-to-campus-for-lunch-talk/.

unlikely that CLR will bridge the gap between its goods and Lawn's. A court would likely find in favor of Lawn that the goods are not related.

iv. Defendant's Intent

The presence of bad faith by the defendant can "affect the court's choice of remedy or can tip the balance where the questions are close."[17] CLR arguably offers two different services, publishing legal scholarship and training its members. Legal academics read CLR for the most cutting-edge legal scholarship while publishing in CLR boosts their chance at tenure and their legal reputation. Meanwhile, law firms and judges heavily recruit and seek law students with CLR membership. Potential consumer confusion exists for both readers and future employers.

If you take Lawn's satirical posts literally, then it is actively seeking to cause consumer confusion. In a March 2022 Instagram post, they answered a question on the benefits of joining CLR vs. Lawn, responding that "CLR is something to put on your resume. California Lawn Review is also something to put on your resume, in the hopes that employers overlook the 'n.'"[18] Later that same month, Lawn posted a call for spring submissions, stating "[y]ou can tell everyone 'I got published in The California Lawn Review!' It's not our fault if they don't hear the 'n.'"[19] CLR would argue that this is clear and unequivocal evidence of Lawn's bad intent while Lawn would likely retort that this was said in jest and that their membership is anonymous. A court could go either way on the evidence of Lawn's bad faith depending on whether it interpreted Lawn's posts satirically or seriously.

[17] Virgin Enterprises Ltd. v. Nawab, 335 F.3d at 151.
[18] CAL. LAWN REV., INSTAGRAM (Mar. 11, 2022), https://www.instagram.com/p/Ca-S7psJ0_d/.
[19] CAL. LAWN REV., *Review Us a Lawn*, INSTAGRAM (Mar. 29, 2022), https://www.instagram.com/p/CbswgM-vZen/.

v. Actual Confusion

Actual consumer confusion clearly shows a likelihood of consumer confusion. In *Virgin*, the court held that an affidavit by a single former employee of Virgin Wireless that stated that some customers asked if the two companies were affiliated was sufficient to prove actual confusion.[20] CLR could submit an affidavit of Lawrence Myung who was initially confused as a 1L when he first saw Lawn's publication freely distributed at Berkeley Law. He could testify that initially he believed that Lawn was affiliated with CLR, which drew his interest in the publication. CLR could make the case that this phenomenon happens annually with dozens of 1Ls being confused every fall. Lawn could rebut that Lawrence, and other law students, would read anything placed throughout the law school to procrastinate doing their actual readings. However, a court would likely conclude that the evidence is weighed in CLR's favor.

vi. Purchaser Care/Sophistication

Courts also look at the degree of sophistication of consumers when deciding the likelihood of confusion. A sophisticated consumer includes "highly trained professionals, they know the market and are less likely than untrained consumers to be misled or confused by the similarity of the marks."[21] Lawn could try to argue that the consumers here are lawyers, which is a highly trained profession. Certainly, a lawyer could tell the difference between the Berkeley Law's flagship law review and a satirical magazine. CLR could counterargue that big law firms looking at hundreds of applications during OCI or understaffed public interest organizations would not be able to engage in the necessary purchaser care to distinguish between CLR and Lawn. If someone were to place Lawn on their application, then they might be hired on the

[20] Virgin Enterprises Ltd. v. Nawab, 335 F.3d at 151.
[21] *Id.*

mistaken belief that they were a member or published an article in CLR. Considering this last fact, the court would likely find in favor of CLR on the sophistication of consumers.

b. On balance, a court would likely find in favor of CLR based on the six factors.

Of the six factors examined here, at least three of the factors are in favor of CLR. CLR is strongly favored on the similarity of the marks, the existence of actual confusion, and possible lack of purchaser sophistication/care. It is unclear where the court would land on the strength of the mark and defendant's bad faith intent while Lawn is favored on the lack of proximity of the services. However, a court could conceivably also find for CLR on these last three factors as well depending on the court's analysis. In particular, the possible holding of bad faith by Lawn, especially their two posts that directly recognize and arguably encourage consumer confusion, could certainly tip the scales in favor of CLR and be the final nail in the coffin.

2. CLR will likely fail in asserting a dilution claim because it is not a famous mark.

Given the highly politicized and occasionally crude nature of Lawn, there is likely a good case for dilution based on tarnishment grounds – harming CLR's reputation.[22] However, a mark must be famous to assert a dilution claim and a mark is only famous "if it is widely recognized by the general consuming public."[23] Successful dilution claims are typically asserted by national companies with high brand recognition such as Victoria's Secret, Toys R' Us, and Starbucks. CLR may be one of the most historic and highly regarded law reviews in the nation, but it is still primarily only read by those in the legal profession. Outside the law school, the average student or faculty would likely not recognize the mark. It is an open question whether evidence of

[22] For example, Lawn recently posted an Instagram story about how the Class of 2023 was invited to getting "dank" with Dean Erwin Chemerinsky at his personal residence in honor of 4/20.
[23] 15 U.S.C. §1125(c).

"regional fame" or "niche fame" might be satisfactory, which this paper does not seek to resolve today.[24] Ultimately, CLR's trademark is likely not sufficiently famous to assert a dilution claim.

II. Trademark Defenses

a. Lawn's descriptive & nominative fair uses defenses would likely fail.

Originally, Lawn's publication was mainly reviews of various lawns, which could make it eligible for protection under descriptive fair use.[25] Just like there are so many ways to say chicken fry, there are only so many ways to name a periodical that reviews lawns.[26] However, it has since shifted its publication to focus on longer-form satirical writing, which does not qualify. Nominative fair use may protect Lawn's usage of CLR's trademark in their content but could not provide protection for infringement claims on Lawn's trademark itself.[27] Therefore, Lawn's only hope for truly being able to use their mark is to be protected under the First Amendment.

b. Lawn would be protected by the First Amendment for parodying CLR.

As evident by the pending *Jack Daniels* case, different circuits have their own inquiry on how the First Amendment and likelihood of confusion test interact with one another. For the purposes of this memo, it will be assumed that Lawn will be able to prove its an expressive work and is bound by the *Rogers* test.[28] When an expressive work allegedly infringes a mark, it is appropriate to weigh the public interest in free expression against the public interest in avoiding consumer confusion. Under *Rogers*, the court requires the plaintiff to show that the defendant's

[24] DINWOODIE, supra note 4, 698 (6th ed. 2022).
[25] *See* 1 CAL. LAWN REV. I (Fall 2021) & II (Spring 2022).
[26] Zatarains, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d at 786, 795 (5th Cir. 1983).
[27] *See, e.g.*, New Kids on the Block v. News America Publishing, Inc., 971 F.2d 302 (9th Cir. 1992) (finding that a newspaper could use the trademarked name of the pop band in their poll on the most popular band member).
[28] Lawn is a student-run publication that distributes its content for free, including an ad-free website. Moreover, its satirical articles and legal critiques meets the bar for expressiveness, certainly more than the sufficiently expressive parody dog chew toys. *See* Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 257 (4th Cir. 2007).

use of the mark is either (1) "not artistically relevant to the underlying work" or (2) "explicitly misleads consumers as to the source or content of the work."[29]

1. Lawn's use of the mark is artistically relevant to the underlying work.

CLR could likely argue that Lawn's use of the mark is not artistically relevant to the underlying work. They might point to the Spring 2023 issue's "Campus News" and "Lifestyle & Culture" sections, which has little to do with CLR.[30] If anything, they could argue that Lawn is a parody of Berkeley Law generally instead of CLR specifically.[31] Therefore, CLR could conclude that Lawn's usage of the mark shouldn't receive First Amendment protection.

However, Lawn could counterargue that its usage of the mark is artistically relevant to the underlying mark. For example, it has recently posted "Critical Thoughts on CLR Write-On and the Myth of Meritocracy: As Discussed by Animals Wearing Hats" and "California 'Right On' Competition."[32] The former is a critique on CLR's perpetuation of legal elitism while the latter parodies CLR's write-on process through a "Right-On" process that involves hackey-sacking and rolling Js. Additionally, Lawn could point to cases like *Mattel, Inc v. MCA Records*, which protected the use of Barbie in the title of a parody since it was relevant to the song that is about Barbie and the values the band claims the mark represents.[33] Lawn could conclude that it deserves First Amendment protection since it parodies not only CLR, but the values of the legal profession it believes CLR represents.

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[29] Gordon v. Drape Creative, Inc., 909 F.3d 257, 265 (9th Cir. 2018).
[30] II CAL. LAWN REV. I, Spring 2023.
[31] In the Hyundai Super Bowl ad, the district court granted summary judgment to LVH on similar grounds.
[32] CAL. LAWN REV., "Critical Thoughts on CLR Write-On and the Myth of Meritocracy. As Discussed by Animals Wearing Hats," INSTAGRAM (Mar. 23, 2023), https://www.instagram.com/p/CqJgUN6OkEA/; CAL. LAWN REV., "California Lawn Review Begins 'Right On' Competition," INSTAGRAM (Mar. 20, 2023), https://www.instagram.com/p/CqBcp84vUYu/.
[33] 296 F.3d 894, 902 (9th Cir. 2002).

Admittedly, this is a novel case. Most case law deals with a parody in the form of a singular product, artistic work, or ad. Meanwhile, Lawn is a bi-annual satirical magazine with many different articles and forms of content. A court could use a restrictive analysis that looks at each piece of content, but a court would more likely find that Lawn's usage of CLR's mark is artistically relevant because it holistically is about CLR and the values it represents.

2. Lawn's use of the mark does not explicitly mislead consumers as to the source or content of the work.

CLR could point to cases like *Anheuser-Busch, Inc. v. Balducci Publications* and *PETA v. Doughney*, in which parody works such as a humor magazine or parody website, without and with disclaimers, were not protected by the First Amendment in so forth that the Lanham Act didn't apply.[34] Similarly, Lawn does not have clear disclaimers. However, Lawn could argue that its humorous content like the Barbie song in *Mattel* is already an effective disclaimer, clearly making it apparent to consumers that it is a parody.[35] Moreover, they are expressing themselves in ways that would not be approved by CLR and could potentially harm a student's legal career, which goes to the heart of the First Amendment defense in trademark law. [36] Although this is an extremely close case, a court would likely find in favor of Lawn.

CONCLUSION

Lawn's mission statement is that "[t]here are too few spaces for law students to share their thoughts and creativity, law-related or not. We want to create that space."[37] It is a successfully parody while the public interest favors freedom of expression. An outcome against Lawn would be an overreach of trademark law and a devasting loss for Berkeley Law.

[34] 28 F.3d 769, 776-77 (8th Cir. 1994); 263 F.3d 359, 366-67 (4th Cir. 2001).
[35] 296 F.3d 894, 902 (9th Cir. 2002).
[36] *See, e.g.*, Neil Vigdor, "A Law Student Mocked the Federalist Society. It Jeopardized His Graduation," N.Y. TIMES (June 3, 2021), https://www.nytimes.com/2021/06/03/us/stanford-federalist-society-nicholas-wallace.html.
[37] "Submissions," CAL. LAWN REV., https://californialawnreview.org/submissions/.

APPENDIX

Exhibit #A

CALIFORNIA LAW REVIEW

Exhibit #B

CALIFORNIA LAWN REVIEW

Applicant Details

First Name	**Christopher**
Last Name	**Pirog**
Citizenship Status	**U. S. Citizen**
Email Address	**christopher.pirog@gmail.com**
Address	**Address** Street **3835 9th Street N., 607 W** City **Arlington** State/Territory **Virginia** Zip **22203** Country **United States**
Contact Phone Number	**443-205-0007**

Applicant Education

BA/BS From	**University of Baltimore**
Date of BA/BS	**December 2008**
JD/LLB From	**University of Baltimore School of Law** **http://www.law.ubalt.edu**
Date of JD/LLB	**May 20, 2012**
Class Rank	**33%**
Law Review/Journal	**Yes**
Journal(s)	**ILS Journal of International of Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Evan A. Evans Constitutional Law Moot Court Team**

Bar Admission

Admission(s)	**Maryland**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Specialized Work Experience	**Appellate**

Recommenders

Groher, Casey
casey.groher.2@us.af.mil
(202) 758-9511

Thravalos, Haridimos
haridimos.v.thravalos.civ@mail.mil
703-695-7218

Johnson, Tiffany
tiffany.a.johnson86.mil@mail.mil
(864) 873-8508

References

Mr. Haridimos V. Thravalos Chief, Motions and Appeals Section Office of the Chief Prosecutor Office of Military Commissions haridimos.v.thravalos.civ@mail.mil (703) 695-7218; Lieutenant Colonel Tiffany A. Johnson Managing Trial Counsel Office of the Chief Prosecutor Office of Military Commissions tiffany.a.johnson86.mil@mail.mil (703) 695-6938; Lieutenant Colonel Casey J. Groher Air Force Office of the Legislative Liaison U.S. Air Force casey.groher.2@us.af.mil (202) 758-9511; The Honorable Marcus Z. Shar Circuit Court for Baltimore City mzshar@gmail.com (410) 916-4243; The Honorable William D. Quarles, Jr. (Ret.) U.S. District Court for District of Maryland wquarles12@gmail.com (Judge Quarles requested that his phone number be provided by separate correspondence, if requested)

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Christopher J. Pirog
3838 Ninth Street North, Unit 607W
Arlington, VA 22203
(443) 205-0007
christopher.pirog@gmail.com

June 29, 2023

The Honorable James O. Browning
U.S. District Court for the District of New Mexico
Pete V. Domenici United States Courthouse
Albuquerque, NM 87102

Dear Judge Browning,

I am writing to apply for a clerkship in your chambers for the 2024–25 term, or the next available term for which you are hiring. I currently serve in the U.S. Air Force as a Judge Advocate in Arlington, Virginia. I intend to transition off Active Duty next year.

My first duty location was at the 27th Special Operations Wing, at Cannon Air Force Base. It was during this assignment that I developed my deep affection for the state of New Mexico, its landscape, history, and rich culture. It is for these reasons that I am aiming to return. While researching jurisdictions, I learned of your career as a former deputy attorney general for the New Mexico Department of Justice, and your decades long experience as a federal judge. Put simply, it would be an honor for me to clerk for you, given my desire to continue my career as a prosecutor and public servant.

Currently, I serve as an appellate counsel with the Office of the Chief Prosecutor under the Office of the Secretary of Defense. In this capacity, I am responsible for researching and writing motions on behalf of the United States in actively litigated cases and drafting appellate briefs before the U.S. Court of Appeals for the District of Columbia Circuit. Prior to joining the Air Force, I served as a local prosecutor in Washington, D.C., and clerked for a well-respected Maryland state court judge in Baltimore City. These combined experiences give me a strong skill set that I believe would be an asset to your chambers.

Undoubtedly, you are considering countless other quality applicants. While my path to a federal clerkship is somewhat non-traditional, it is one that I believe makes me a strong candidate for consideration. Whether it is discussing a complex and novel legal issue or offering great places to eat or sightsee from my time overseas in Germany and Korea, I would be honored to have the opportunity to interview with you. Thank you for your consideration.

Very respectfully,

CHRISTOPHER J. PIROG

ATTORNEY | MAJOR | U.S. AIR FORCE

3835 Ninth Street North, Unit 607W, Arlington, VA 22203 | (443) 205-0007 | christopher.pirog@gmail.com

EXPERIENCE

UNITED STATES AIR FORCE

Motions and Appellate Counsel

Office of the Chief Prosecutor, Office of the Secretary of Defense, Pentagon, Virginia August 2022 – Present

- Assist in all facets of 4 actively litigated terrorism prosecutions, including managing classified discovery, researching and drafting pre-trial motions, and writing concise legal memoranda.
- Worked with the Department of Justice's National Security Division on 3 appeals filed in the D.C. Circuit, drafting complex legal memoranda addressing both statutory and Constitutional law issues.

Deputy Staff Judge Advocate

8th Fighter Wing, Republic of Korea July 2021 – July 2022

- Led a 10-person team as the principal advisor to the commander of legal operations on all matters, including operational, fiscal, administrative, criminal, contract, and international law.
- Provided legal advice for over 100 service members on a wide array of legal issues, including family law, consumer law, wills and estate planning, and landlord-tenant law.

Defense Counsel

52nd Fighter Wing, Germany July 2019 – July 2021

- Represented service members facing federal charges and administrative sanctions. First-chaired numerous jury and bench trials, including felonies and misdemeanors, throughout Europe.
- Litigated complex cases, including sexual assault, aggravated assault and battery, check fraud, larceny, narcotics, computer, and internet-related crimes.

Prosecutor

Spangdahlem Air Base, Germany; Cannon Air Force Base, New Mexico October 2015 – July 2019

- Led an 11-person prosecution unit prosecuting 125 felony, misdemeanor, and administrative sanction cases. Routinely advised federal special agents on criminal law issues.
- Oversaw the pre- and post-trial processing of cases on the installation. Represented the United States at probable cause indictment hearings, and discharge proceedings involving serious misconduct.

U.S. ATTORNEY'S OFFICE, DISTRICT OF COLUMBIA

Special Assistant U.S. Attorney October 2013 – September 2014

- Managed 150 active cases, handling all aspects of trial preparation, including interviewing potential witnesses, and working with law enforcement to gather evidence.
- Responsible for providing oral arguments on all motions, conducting direct and cross examinations, opening statements, and closing arguments.

THE HONORABLE MARCUS Z. SHAR, CIRCUIT COURT FOR BALTIMORE CITY

Judicial Law Clerk July 2012 – August 2013

- Drafted orders and rulings on complex legal issues involving civil, administrative, and criminal law. Tracked and prioritized the docket's numerous filings and matters under consideration.
- Regularly communicated with attorneys to prepare for hearings and trials. Summarized motions, verified legal authorities, and performed extensive legal research.

EDUCATION

University of Baltimore School of Law, *Baltimore, MD* May 2012

Juris Doctor (*cum laude*)

ILS Journal of International Law, Editor-in-Chief

University of Baltimore's Merrick School of Business, *Baltimore, MD* December 2008

Bachelor of Science in Business Administration (Accounting)

President, University of Baltimore's Student Government

CHRISTOPHER J. PIROG

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Lieutenant Colonel Tiffany A. Johnson
Managing Trial Counsel
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Lieutenant Colonel Casey J. Groher
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The Honorable Marcus Z. Shar
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The Honorable William D. Quarles, Jr. (Ret.)
U.S. District Court for District of Maryland
wquarles12@gmail.com
(Judge Quarles requested that his phone number
be provided by separate correspondence, if requested)

LEGAL INTERNSHIPS

U.S. SECURITIES AND EXCHANGE COMMISSION, *Washington, D.C.*

- ***Law Extern***, Fall 2011

BALTIMORE CITY STATE'S ATTORNEY'S OFFICE, *Baltimore, MD*

- ***Summer Intern***, Summer 2011

U.S. ATTORNEY'S OFFICE, DISTRICT OF MARYLAND, *Baltimore, MD*

- ***Law Clerk***, Fall 2010

THE HONORABLE WILLIAM D. QUARLES, JR., U.S. DISTRICT COURT, DISTRICT OF MARYLAND, *Baltimore, MD*

- ***Judicial Intern***, Summer 2010

ADDITIONAL INFORMATION

- Active TS/SCI security clearance.
- Active Bar Membership (Maryland), 2012 to Present.

Name : Christopher Pirog
Student ID: 1094359
Birthdate : 07/07/****
SSN : ***-**-7065
Address : 1401 Charlestown Dr
Edgewood, MD 21040
United States

university of baltimore
OFFICE OF THE REGISTRAR
1420 NORTH CHARLES STREET
BALTIMORE, MARYLAND 21201-5779

Print Date : 2014-08-29

----- Degrees Awarded -----

Degree : Bachelor of Science
Confer Date : 2008-12-21
Degree GPA : 3.450
Plan : Business Administration
Sub-Plan : Accounting

Degree : JD-Juris Doctor
Confer Date : 2012-05-07
Degree GPA : 3.297
Degree Rank : 123 of 342
Degree Honors : Cum Laude
Plan : JD - Juris Doctor

----- Beginning of Law Record -----

Fall 2009

Course		Description	Attempted	Earned	Grade	Points
Program : Law Full Time Day						
Plan : Law Full Time Day Major						
LAW	600	CIVIL PROCEDURE I	3.00	3.00	B	9.000
LAW	604	CRIMINAL LAW	3.00	3.00	B	9.000
LAW	608	TORTS I	4.00	4.00	B	12.000
LAW	611	ILS/Contracts I	3.00	3.00	B+	9.990
LAW	611A	ILS/Contracts I	3.00	3.00	C+	6.990
TERM GPA : 2.936		TERM TOTALS :	16.00	16.00		46.980
CUM GPA : 2.936		CUM TOTALS :	16.00	16.00		46.980

Spring 2010

Course		Description	Attempted	Earned	Grade	Points
Program : Law Full Time Day						
Plan : Law Full Time Day Major						
LAW	603	CONTRACTS II	3.00	3.00	C	6.000
LAW	607	PROPERTY	4.00	4.00	B	12.000
LAW	613	INTRODUCTION TO ADVOCACY	2.00	2.00	B	6.000
LAW	621	AMERICAN LEGAL HISTORY	3.00	3.00	B-	8.010
LAW	650	CONSTITUTIONAL LAW I	4.00	4.00	B	12.000
TERM GPA : 2.751		TERM TOTALS :	16.00	16.00		44.010
CUM GPA : 2.843		CUM TOTALS :	32.00	32.00		90.990

Summer 2010

Course		Description	Attempted	Earned	Grade	Points
Program : Law Full Time Day						
Plan : Law Full Time Day Major						
LAW	651	EVIDENCE	3.00	3.00	B+	9.990
LAW	836	JUDICIAL INTERNSHIP	3.00	3.00	PS	
TERM GPA : 3.330		TERM TOTALS :	6.00	6.00		9.990
CUM GPA : 2.885		CUM TOTALS :	38.00	38.00		100.980

Fall 2010

Course		Description	Attempted	Earned	Grade	Points
Program : Law Full Time Day						
Plan : Law Full Time Day Major						
LAW	585	STUDENT FELLOWS PROGRAM	1.00	1.00	CR	
LAW	601	CIVIL PROCEDURE II	3.00	3.00	A	12.000
LAW	711	CON CRIMINAL PROC I	3.00	3.00	A-	11.010
LAW	716	FAMILY LAW	3.00	3.00	B+	9.990
LAW	860	ATTORNEY INTERNSHIP	4.00	4.00	PS	
TERM GPA : 3.667		TERM TOTALS :	14.00	14.00		33.000
CUM GPA : 3.045		CUM TOTALS :	52.00	52.00		133.980

- Transcript guide printed on back.
- The name of the university appears in small white print across the entire face of this 11 x 8 1/2 transcript.
- Brown stains indicate attempted alteration (see reverse for details).

Michael T. Driscoll
Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD LIGHT SOURCE

Name : Christopher Pirog
Student ID: 1094359
Birthdate : 07/07/****
SSN : ***-**-7065
Address : 1401 Charlestown Dr
Edgewood, MD 21040
United States

university of baltimore
OFFICE OF THE REGISTRAR
1420 NORTH CHARLES STREET
BALTIMORE, MARYLAND 21201-5779

Spring 2011

Course		Description	Attempted	Earned	Grade	Points
Program : Law Full Time Day						
Plan : Law Full Time Day Major						
LAW	585	STUDENT FELLOWS PROGRAM	1.00	1.00	CR	
LAW	597	CONSTITU LAW MOOT CRT COMPETI	2.00	2.00	CR	
LAW	742	COMMERCIAL LAW	4.00	4.00	B+	13.320
LAW	743	SALES AND LEASES	3.00	3.00	B+	9.990
LAW	876	SENT & PLEA BARGN SEMINAR	3.00	3.00	A-	11.010
TERM GPA : 3.432		TERM TOTALS :	13.00	13.00		34.320
CUM GPA : 3.117		CUM TOTALS :	65.00	65.00		168.300

Summer 2011

Course		Description	Attempted	Earned	Grade	Points
Program : Law Full Time Day						
Plan : Law Full Time Day Major						
LAW	652	PROF RESPONSIBILITY	3.00	3.00	B	9.000
TERM GPA : 3.000		TERM TOTALS :	3.00	3.00		9.000
CUM GPA : 3.111		CUM TOTALS :	68.00	68.00		177.300

Fall 2011

Course		Description	Attempted	Earned	Grade	Points
Program : Law Full Time Day						
Plan : Law Full Time Day Major						
LAW	655	CONSTITUTIONAL LAW II	2.00	2.00	A-	7.340
LAW	717	BUSINESS ORGANIZATIONS	4.00	4.00	A-	14.680
LAW	748	LEGISLATION	3.00	3.00	A	12.000
LAW	757	SECURITIES REGULATION	3.00	3.00	A	12.000
LAW	856	BANKING LAW WORKSHOP	3.00	3.00	A	12.000
TERM GPA : 3.868		TERM TOTALS :	15.00	15.00		58.020
CUM GPA : 3.269		CUM TOTALS :	83.00	83.00		235.320

Spring 2012

Course		Description	Attempted	Earned	Grade	Points
Program : Law Full Time Day						
Plan : Law Full Time Day Major						
LAW	803	APPELLATE ADVOCACY WKSHP	2.00	2.00	B+	6.660
LAW	817	LITIGATION PROCESS	3.00	0.00	W	
LAW	825	TRIAL ADVOCACY	2.00	2.00	A-	7.340
LAW	838	LAW AND RELIGION SEMINAR	3.00	3.00	A-	11.010
LAW	877	ISSUES IN LAW ENFORCEM SEM	3.00	3.00	B+	9.990
TERM GPA : 3.500		TERM TOTALS :	13.00	10.00		35.000
CUM GPA : 3.297		CUM TOTALS :	96.00	93.00		270.320

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Michael T. Driscoll
Registrar

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University of Baltimore

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Grading:

Effective Fall 1999:

Grade		Quality Points Per Credit Hour*	Grade		Quality Points Per Credit Hour*	
A	=	4.00	C	=	2.00	
A-	=	3.67	C-	=	1.67	
B+	=	3.33	D+	=	1.33	
B	=	3.00	D	=	1.00	
B-	=	2.67	D-	=	.67	
C+	=	2.33	F	=	.00	
			FA	=	.00	Failure due to absences
			XF	=	.00	Failure due to academic integrity violation

Effective Prior to Fall 1999:

Grade	Quality Points Per Credit Hour*	Undergraduate	Graduate	Professional (Law)
A	4.00	A	A	A
B+	3.50	B+	B+	B+
B	3.00	B	B	B
C+	2.50	C+	C+	C+
C	2.00	C	C	C
D+	1.50	N/A	N/A	D+
D	1.00	D	N/A	D
F	0.00	F	F	F

*All credit hours are semester credit hours.

In addition, the following grades may also be given in some programs.

W	0.0	(Withdrew)
WA	0.0	(Withdrawn Administratively)
PS	0.0	(Pass)
AU	0.0	(Audit)
CS	0.0	(Continuing Study)
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NR	0.0	(No Grade Received)
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RD	0.0	(Repeat of a "D" grade)
RF	0.0	(Repeat of an "F" grade)
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U	0.0	(Unsatisfactory)
WF	0.0	(Withdrew Failing)
WP	0.0	(Withdrew Passing)
NG	0.0	(No Grade Submitted)
*	0.0	(Grade Not Counted in Career)
FA	0.0	(Failure Due to Absences)
TG	0.0	(Temporary grade pending resolution of an academic integrity issue)

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08231108

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Name : Christopher Pirog
Student ID: 1094359
Birthdate : 07/07/****
SSN : ***-**-7065
Address : 1401 Charlestown Dr
Edgewood, MD 21040
United States

university of baltimore
OFFICE OF THE REGISTRAR
1420 NORTH CHARLES STREET
BALTIMORE, MARYLAND 21201-5779

Print Date : 2014-08-29

----- Degrees Awarded -----

Degree : Bachelor of Science
Confer Date : 2008-12-21
Degree GPA : 3.450
Plan : Business Administration
Sub-Plan : Accounting

Degree : JD-Juris Doctor
Confer Date : 2012-05-07
Degree GPA : 3.297
Degree Rank : 123 of 342
Degree Honors : Cum Laude
Plan : JD - Juris Doctor

Transfer Credit from Harford Community College

Applied Toward UGRD Business Administration Program

BA	101	Intro to Business	Accepted	3.00
CIS	102	Intro Info Systems	Accepted	3.00
ENG	101	English Comp I	Accepted	3.00
ACCT	102	Acct Princ II	Accepted	3.00
BA	246	Legal Env. of Business	Accepted	3.00
ECON	101	Macroeconomics	Accepted	3.00
ENG	216	Bus. Communications	Accepted	3.00
ES	105	Earth Science	Accepted	3.00
HIST	202	20th Century World	Accepted	3.00
BA	212	Internet Research	Accepted	1.00
ECON	102	Microeconomics	Accepted	3.00
MATH	109	Precalculus	Accepted	4.00
MATH	216	Intro to Statistics	Accepted	4.00
PHIL	221	Business Ethics	Accepted	3.00
PSY	101	General Psychology	Accepted	3.00
SPCH	106	Bus. & Prof Speech	Accepted	3.00
ACCT	101	Acct Princ I	Accepted	3.00
ART	203	Amer Art	Accepted	3.00
ASTR	151	Astronomy	Accepted	4.00
HIST	102	Hist of West	Accepted	2.00

----- Beginning of Undergraduate Record -----

Fall 2006

Course		Description	Attempted	Earned	Grade	Points
Program : UGRD Business Administration						
Plan : Business Administration Major						
FIN	331	FINANCIAL MANAGEMENT I	3.00	3.00	B	9.000
INSS	300	MANAGEMENT INFORMATION SYSTEMS	3.00	3.00	B-	9.990
MGMT	339	PROCESS AND OPERATIONS MGMT	3.00	3.00	B+	9.990
MKTG	301	MARKETING MANAGEMENT	3.00	3.00	B	9.000
OPRE	315	BUSI APPLI OF DECISION SCIENCE	3.00	3.00	C-	6.990
TERM GPA : 2.998		TERM TOTALS :	15.00	15.00		44.970
CUM GPA : 2.998		CUM TOTALS :	15.00	75.00		44.970

Spring 2007

Course		Description	Attempted	Earned	Grade	Points
Program : UGRD Business Administration						
Plan : Business Administration Major						
OPRE	330	STATISTICAL DATA ANALYSIS	3.00	3.00	B	9.000
TERM GPA : 3.000		TERM TOTALS :	3.00	3.00		9.000
CUM GPA : 2.998		CUM TOTALS :	18.00	78.00		53.970

Summer 2007

Course		Description	Attempted	Earned	Grade	Points
Program : UGRD Business Administration						
Plan : Business Administration Major						

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IDIS	302	ETHICAL ISSUES IN BUS & SOC	3.00	3.00 B+	9.990	
TERM GPA :	3.330	TERM TOTALS :	3.00	3.00	9.990	
CUM GPA :	3.046	CUM TOTALS :	21.00	81.00	63.960	

Fall 2007

Course		Description	Attempted	Earned	Grade	Points
Program : UGRD Business Administration						
Plan : Business Administration Major						
ACCT	301	INTERMEDIATE ACCOUNTING I	3.00	3.00	B+	9.990
ECON	305	MANAGERIAL ECONOMICS	3.00	3.00	A	12.000
MGMT	300	HUMAN RESOURCE MANAGEMENT	3.00	3.00	A	12.000
MGMT	301	ORGANIZATIONAL BEHAVIOR	3.00	3.00	A	12.000
TERM GPA :	3.833	TERM TOTALS :	12.00	12.00		45.990
CUM GPA :	3.332	CUM TOTALS :	33.00	93.00		109.950

Winterim 2008

Course		Description	Attempted	Earned	Grade	Points
Program : UGRD Business Administration						
Plan : Business Administration Major						
MGMT	302	GLOBAL BUSINESS ENVIRONMENT	3.00	3.00	A-	11.010
Course Topic(s): Global Business in Mexico						
TERM GPA :	3.670	TERM TOTALS :	3.00	3.00		11.010
CUM GPA :	3.360	CUM TOTALS :	36.00	96.00		120.960

Spring 2008

Course		Description	Attempted	Earned	Grade	Points
Program : UGRD Business Administration						
Plan : Business Administration Major						
ACCT	302	INTERMEDIATE ACCOUNTING II	3.00	3.00	A-	11.010
ACCT	306	COST ACCOUNTING	3.00	3.00	A-	11.010
ACCT	403	Advanced Financial Reporting	3.00	3.00	A-	11.010
ACCT	405	INCOME TAXATION	3.00	3.00	A	12.000
TERM GPA :	3.753	TERM TOTALS :	12.00	12.00		45.030
CUM GPA :	3.458	CUM TOTALS :	48.00	108.00		165.990

Fall 2008

Course		Description	Attempted	Earned	Grade	Points
Program : UGRD Business Administration						
Plan : Business Administration Major						
ACCT	310	INTERMED ACCOUNTING III	3.00	3.00	B	9.000
ACCT	317	ACCOUNTING INFO SYSTEMS	3.00	3.00	A	12.000
ACCT	401	AUDITING	3.00	3.00	B	9.000
WRIT	300	ADVANCED EXPOSITORY WRITING	3.00	3.00	A-	11.010
Course Topic(s): MUST ALSO ENROLL IN WRIT 300L						
WRIT	300L	WEB WRITING LAB				
Course Topic(s): MUST ALSO ENROLL IN WRIT 300						
TERM GPA :	3.418	TERM TOTALS :	12.00	12.00		41.010
CUM GPA :	3.450	CUM TOTALS :	60.00	120.00		207.000

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Grading:

Effective Fall 1999:

Grade		Quality Points Per Credit Hour*	Grade		Quality Points Per Credit Hour*	
A	=	4.00	C	=	2.00	
A-	=	3.67	C-	=	1.67	
B+	=	3.33	D+	=	1.33	
B	=	3.00	D	=	1.00	
B-	=	2.67	D-	=	.67	
C+	=	2.33	F	=	.00	
			FA	=	.00	Failure due to absences
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Effective Prior to Fall 1999:

Grade	Quality Points Per Credit Hour*	Undergraduate	Graduate	Professional (Law)
A	4.00	A	A	A
B+	3.50	B+	B+	B+
B	3.00	B	B	B
C+	2.50	C+	C+	C+
C	2.00	C	C	C
D+	1.50	N/A	N/A	D+
D	1.00	D	N/A	D
F	0.00	F	F	F

*All credit hours are semester credit hours.

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W	0.0	(Withdrew)
WA	0.0	(Withdrawn Administratively)
PS	0.0	(Pass)
AU	0.0	(Audit)
CS	0.0	(Continuing Study)
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Page 1 of 1

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Print Date : 2014-08-29

----- Degrees Awarded -----

Degree : Bachelor of Science
Confer Date : 2008-12-21
Degree GPA : 3.450
Plan : Business Administration
Sub-Plan : Accounting

Degree : JD-Juris Doctor
Confer Date : 2012-05-07
Degree GPA : 3.297
Degree Rank : 123 of 342
Degree Honors : Cum Laude
Plan : JD - Juris Doctor

----- Beginning of Graduate Record -----

Spring 2009

Course		Description	Attempted	Earned	Grade	Points
Program : Grad Business Degree						
Plan : Univ of Balto/Towson Univ/ MBA Major						
ECON	640	DOMESTIC & GLOBAL BUS ENV	3.00	3.00	A-	11.010
INSS	640	Info Systems in Business	3.00	3.00	B+	9.990
TERM GPA :	3.500	TERM TOTALS :	6.00	6.00		21.000
CUM GPA :	3.500	CUM TOTALS :	6.00	6.00		21.000

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D+	1.50	N/A	N/A	D+
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MEMORANDUM FOR ALL REVIEWING AUTHORITIES

FROM: LIEUTENANT COLONEL CASEY J. GROHER

SUBJECT: Letter of Recommendation for Major Christopher J. Pirog

1. I am pleased to write this letter of recommendation for Major Christopher J. Pirog and enthusiastically endorse his application for a judicial law clerk position.

2. I have been an active-duty Judge Advocate in the United States Air Force since January 2010. I presently serve as Legislative Counsel to the Secretary of the Air Force in the Office of the Legislative Liaison, Headquarters Air Force. From July 2017 to July 2020, I served as Senior Defense Counsel for United States Forces Europe and United States Forces Africa. In this role, I was responsible for supervising 13 different attorneys and 12 paralegals in the provision of defense services to over 35,000 Airmen in 45 countries across Europe, Africa, and the Middle East. I can unequivocally say Chris was one of the most zealous, professional, ethical, and effective litigators/officers/attorneys I had the pleasure of supervising.

3. Before Maj Pirog became one of my Area Defense Counsel, I litigated cases against him while he served as Chief of Military Justice (installation lead for the Prosecution) at Spangdahlem Air Base, Germany. I was perpetually impressed by Chris's passion in the courtroom, assiduousness in meeting deadlines, professional communications with the Defense, and diligence throughout the discovery process. I always had the sense Maj Pirog's ultimate desire was to serve the interests of justice, not just "win" at trial. For this reason, I was elated to learn the Air Force chose Chris to become one of my Area Defense Counsel, through a highly competitive and rigorous assignment selection process. Only individuals who have a demonstrated track record of litigation proficiency, industriousness, and superior character are chosen to become Area Defense Counsel. Major Pirog exceeded all these qualifications.

4. As his supervisory attorney, I had the opportunity to witness Major Pirog's stellar organization, written work product, and litigation prowess on numerous occasions. As an Area Defense Counsel, Maj Pirog was responsible for representing military members in a wide range of military justice matters, from administrative action to felony-level court-martial, covering a geographic area that encompassed Europe, Africa, the United Kingdom, and the Middle East. Major Pirog litigated 12 courts-martial as an Area Defense Counsel, and deftly handled 9 probable cause hearings, ensuring justice and quality representation for military members facing serious criminal charges. His pre-trial preparation and tireless work ethic were unmatched among his peers and allowed Chris to navigate the various stages of trial with confidence and authority. During motions practice, his strong research and writing skills often won the day. At trial, his advocacy and legal acumen were readily apparent. Impressively, his superb time management and task organization were critical to the effective representation of nearly 800 military members over a two-year span. Chris's superb advocacy during a sexual assault discharge board led to review of due process rights across the Judge Advocate General's Corps.

5. In short, I believe Major Pirog's experience and skillset make him an extraordinary candidate for a law clerk position. I've reviewed his evaluations spanning his entire eight-year career in the Judge Advocate General's Corps. In addition to his time as Chief of Military Justice and Area Defense Counsel, he has held a variety of demanding positions as a Judge Advocate, all of which demonstrate him to be a motivated self-starter, with remarkable attention to detail, and the highest standards of professional conduct. I've also spent time with Chris outside of duty hours and find him to be a delightful conversationalist and joy to be around. His integrity, service, sacrifice, and personal characteristics merit serious consideration for a law clerk position!

6. Should you require additional information, I can be reached at casey.groher.2@us.af.mil or 202-758-9511.

CASEY J. GROHER, Lt Col, USAF

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

OFFICE OF THE
CHIEF PROSECUTOR

June 16, 2023

RE: Letter of Recommendation for Major Christopher J. Pirog, U.S. Air Force

Your Honor:

It is my pleasure to recommend Major Christopher J. Pirog for a law clerk position.

By way of introduction, I am the Chief of the Motions and Appeals Section in the Office of the Chief Prosecutor of Military Commissions (OCP). In this capacity, I oversee critical motions and appellate litigation arising from military commissions, including the 9/11 military commission and the USS COLE military commission.

Chris joined OCP in August 2022, and because of his extensive trial and litigation experience was immediately assigned to the Motions and Appeals Section. Since that time, Chris has worked directly under my supervision and has handled complex legal issues of domestic, constitutional, and international law. Chris has brought the highest level of intelligence, initiative, and integrity to each issue assigned to him. His research skills and analytical abilities are exceptional, and his memoranda are clear, concise, and consistently identify the pertinent case law and governing authorities. Moreover, Chris routinely arrives early and leaves late, ensuring that the mission comes first. Notably, Chris simultaneously worked on three appeals in the U.S. Court of Appeals for the District of Columbia Circuit, aiding OCP and the Department of Justice present complex statutory and constitutional law arguments.

Chris's collaboration and leadership skills have been equally impressive. For example, this past spring, Chris was handpicked to lead a team of thirteen prosecutors, five paralegals, and four intelligence analysts in the drafting of a complex 252-page brief. The brief addressed an issue of first impression in the USS COLE prosecution. While the matter is still under consideration by the military judge, Chris's research, writing, and organizational skills were pivotal in our office filing a high-quality product.

At OCP, I have supervised dozens of attorneys, and Chris ranks as one of the best. Based on his proven ability, I am confident that Chris would excel as a law clerk for you.

If you have any questions, please feel free to contact me directly at 703-695-7218 and haridimos.v.thravalos.civ@mail.mil.

Haridimos V. Thravalos

HARIDIMOS V. THRAVALOS
Chief, Motions and Appeals Section
Office of the Chief Prosecutor

MEMORANDUM FOR JUDICIAL LAW CLERK APPLICATION

FROM: LIEUTENANT COLONEL TIFFANY A. JOHNSON, USAF

SUBJECT: Letter of Recommendation for Major Christopher J. Pirog

1. It is an honor to recommend my esteemed Air Force colleague, Major Christopher J. Pirog, to take on the responsibilities and duties of service as a law clerk in our judicial system.

2. Christopher is currently assigned to my Air Force Element at the Office of the Chief Prosecutor. I also have the pleasure of serving with him as he has supported the prosecution efforts of our military commissions, including the military commission of *United States v. Abd al Hadi al-Iraqi*, a senior al Qaeda member who has been convicted of traditional law of war violations such as the use of perfidious and treacherous means of warfare and attacking protected property. In my capacity as Managing Trial Counsel of that case, I have witnessed first-hand Christopher's tireless work ethic, his utilization of his national security law background from previous assignments, and his meticulous attention to detail in his legal research and writing.

3. As the senior Air Force leader at the Office of the Chief Prosecutor, I have also reviewed in-depth Christopher's military records in the Air Force. He is a gem, and his records reflect it. Not to belabor the point, but I would be remiss if I did not highlight the exceptionally noteworthy points underlying the recommendation for this officer to another position of great public service and responsibility. First, Christopher started off his career at one of our most elite units located at Cannon Air Force Base in New Mexico. This location is one of only two Air Force Special Operations Command bases in the U.S. Air Force. Christopher led the Command's #1 adverse actions program during this timeframe, cut his teeth on prosecuting courts-martials, and was described by the senior commander on the installation as the "backbone" of the legal office. Second, Christopher was immediately chosen after this tour for a spectacular assignment in the European theater, where he immediately rose to the most coveted position for judge advocate captains and served phenomenally well as the Chief of Military Justice. As the Chief of Military Justice, he not only handled the responsibilities of serving good order and disciple for a 9,500-member military community, but he did it phenomenally well by improving non-judicial timelines by 20%, while also overseeing 55 investigations within a one-year timeframe. Christopher also rose to the occasion during a 16-day multi-victim sexual assault case, where he litigated 12 motions in a trial that ultimately resulted in a 13-year sentence and a dishonorable discharge. It is no surprise after this that Christopher was ranked #1 of the five attorneys in his office during this time. While in Europe, the Air Force also provided Christopher a career opportunity to serve as a defense counsel, where he worked so tirelessly that he represented 912 Airmen in the span of only 2 years and wrote a legal opinion that made it to our most senior executive, the Secretary of the Air Force, securing a positive result for his Colonel client. Third, Christopher was selected for a leadership billet in the Pacific Theater where he served as a Deputy Staff Judge Advocate in Korea, again rising to be the top attorney in his office. It was here that the Air Force charged Christopher with developing a mock sex assault courts-martial that was aired on television to educate 40,000 servicemembers via the Armed Forces Network.

4. Christopher's experiences are not average in the Air Force, they are exceptional. He has already served in two theaters in Europe and the Pacific along with having special operations command experience in the States. While in Europe, he gained experience in national security law when he served as a legal advisor in a two-nation nuclear response exercise in The Netherlands. He has also worked through protecting the rights of a servicemember in France, where he navigated legal issues between nations in a sensitive situation where a U.S. Navy servicemember had been arrested in France. Christopher has also had a specialized opportunity to serve in an Air Operations Center, where an individual can only work if they have the highest level security clearances, signaling the amount of trust our Nation has placed into Christopher. The Air Operations Center serves as the command center for all air operations in a theater where the most sensitive legal issues arise for the command, and Christopher performed his legal duties well in this high-tempo military environment ultimately rising to the position of Deputy in charge of legal advice at the Air Operations Center.

5. Although Christopher's accomplishments are spectacular in their own right, his strongest attribute is his character. Christopher's integrity, spirit of service, and willingness to help his superiors, subordinates, and colleagues is unmatched. It is with great pleasure and honor that I recommend Christopher to serve as a law clerk. Should you require additional information, I can be reached at (864) 873-8508 or tiffany.a.johnson86.mil@mail.mil.

TIFFANY A. JOHNSON, Lt Col, USAF
Managing Trial Counsel
Air Force Element Lead

[redacted] *v. United States* – RFI No. [redacted] ([redacted], [redacted])

I. Introduction

This Memorandum analyzes what the circumstances are, in military law, in which a specification fails to state an offense. Section II states an appellate court's standard of review. Section III analyzes the similarities, and any potential differences, between Rules for Military Commission (R.M.C.) 307(c)(3) (2007) and Rules for Court-Martial (R.C.M.) 307(c)(3) (2008). Section IV discusses case law with respect to circumstances where a specification fails to state an offense. Section V offers concluding thoughts. Appendix A and Appendix B collect excerpts of the text of the Rules.

II. Standard of Review

Whether a specification is defective, and the remedy for such error, are questions of law which an appellate court reviews *de novo*.[1]

III. Analysis

R.M.C 907(b)(1) (2007) and R.C.M. 907(b)(1) (2008) both discuss non-waivable[2] grounds for dismissal.[3] The first ground is if a "[military tribunal] lacks jurisdiction to try the accused for an offense," and the second ground is if "[t]he specification fails to state an offense."[4] The

[1] *United States v. Humphries*, 71 M.J. 209, 212 (C.A.A.F. 2012).

[2] In 2016, the drafters of the R.C.M. moved the challenge that a specification fails to state an offense from the "non-waivable" to the "waivable" section of the Rule. When the Secretary of Defense promulgated the 2019 R.M.C., however, there was no corresponding change. Thus, from 2016 on, the R.C.M. have treated a challenge for failure to state an offense as a waivable ground, whereas the R.M.C. retain that challenge as a non-waivable ground. *Compare* R.C.M. 907(b) (2019) *with* R.M.C. 907(b) (2019). The versions of the R.C.M. and R.M.C. discussed in this Memorandum were the versions in effect during [redacted]'s military commission.

[3] The text of R.M.C. 307(c)(3) and R.C.M. 307(c)(3) is substantially the same. *See* Appendix A (comparing the text of the two rules). The only significant difference in language relates to the R.M.C. referencing its applicability to "military commission," and the R.C.M. referencing its applicability to a "court-martial."

[4] R.M.C 907(b)(1) (2007) and R.C.M. 907(b)(1) (2008).

Discussion sections to both rules direct the reader to R.M.C. 307(c) and R.C.M. 307(c), respectively, for further guidance.

R.M.C 307(c)(3) (2007) and R.C.M. 307(c)(3) (2008) both discuss the required contents of a specification. The text of R.M.C. 307(c)(3) and R.C.M. 307(c)(3) is substantially the same.[5] Even so, R.M.C. 307(c)(3) does not contain a "discussion" section. However, R.C.M. 307(c)(3) does. R.C.M. 307(c)(3)'s discussion section provides:

> (iii) *Specificity.* The specification should be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy. Only those facts that make the accused's conduct criminal ordinarily should be alleged. Specific evidence supporting the allegations ordinarily should not be included in the specifications.

Thus, R.C.M. 307(c)(3)'s discussion section makes clear that when describing an offense in a charging document, "elements of the offense must be alleged, either expressly or by necessary implication."[6] The discussion section further states that the "specification should be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy."[7]

IV. Relevant Case Law

A. Contested vs. uncontested cases

In 2011, in a published opinion, the Court of Appeals for the Armed Forces ("C.A.A.F") held that, *in a contested case*, the "terminal element" of Article 134, Uniform Code of Military Justice ("U.C.M.J."), could not be implied from language in a specification alleging that the appellant had "wrongfully" committed adultery in violation of Article 134, U.C.M.J.[8]

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[5] The only difference in language relates to "aggravating circumstances" under different respective rules. Those differences between the two rules are outside the scope of this Memorandum.

[6] R.C.M. 307(c)(3) Discussion section (G)(i).

[7] R.C.M. 307(c)(3) Discussion section (G)(iii).

[8] *United States v. Fosler*, 70 M.J. 225, 230-231 (C.A.A.F. 2011).

Approximately one year later, however, in 2012, the C.A.A.F. held that in a case where the accused *pleaded guilty* to an Article 134 specification that did not allege the "terminal element," the error was harmless because the military judge advised the accused of the terminal element and the applicable definitions.[9] The C.A.A.F. reasoned that there was no prejudice to the accused's substantial rights, as the accused's case involved a defective specification with a proper plea inquiry.[10] This was distinguishable from a *contested case* involving a defective specification. In cases like the former, any notice issues or potential for prejudice could be cured while there is still ample opportunity either for a change in tactics for the defense or for the accused to withdraw from the plea completely.[11]

B. Failure to object prior to findings and sentence

In 2006, the C.A.A.F. observed that if a specification has not been challenged prior to findings and sentence, the sufficiency of the specification may be sustained "if the necessary facts appear in any form or by fair construction can be found within the terms of the specification."[12]

C. Liberal construing of specifications in favor of validity

In 2011, in an unpublished opinion, a judge on the United States Navy-Marine Corps Court of Criminal Appeals ("U.S.N-M.C.C.C.A."), who concurred in part and dissented in part, stated that "[a]lthough failure of a specification to state an offense is a fundamental defect which can be raised at any time, the United States Court of Appeals for the Armed Forces . . . long ago chose to follow the rule of most federal courts of liberally construing specifications in favor of validity when they are challenged for the first time on appeal."[13]

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[9] *United States v. Ballan*, 71 M.J. 28, 34-35 (C.A.A.F. 2012).

[10] *Id.* at *Ballan*, 71 M.J. 35-36.

[11] *Id.*

[12] *United States v. Crafter*, 64 M.J. 209, 211 (quoting *United States v. Mayo*, 12 M.J. 286, 288 (C.M.A. 1982)).

[13] *United States v. Bishop*, 2011 CCA LEXIS 160, *9 (2011) (citing *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986)).

D. Accused's prejudice due to lack of notice

In 2012, in an unpublished opinion, the U.S.N-M.C.C.C.A. stated that "[i]f a specification fails to allege all the elements of an offense expressly or by necessary implication, we then test for prejudice."[14] The court stated that "[i]n the plain error context the defective specification alone is insufficient to constitute substantial prejudice to [an appellant's] material right."[15] Furthermore, the court stated that "[w]here the prejudice to a material right is rooted *in notice*, the record is examined to see if the missing terminal element is somewhere extant in the trial record, or whether the element is essentially uncontroverted."[16]

V. Conclusion

Whether a reviewing military court will find that a specification fails to state an offense will first depend on if a case is contested or uncontested. If contested, a reviewing court is much more likely to be stricter in determining whether a specification failed to state an offense. However even in contested circumstances, a reviewing court will still look to the record to see if the accused was on notice of what to defend against.

If a case is uncontested, a reviewing court will be much more likely to construe a specification as properly stating an offense, especially if the military judge performs a thorough guilty plea providence inquiry.

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[14] *United States v. Perry*, 2012 CCA LEXIS 288, *24 (citing *United States v. Nealy*, 71 M.J. 73, 77 (C.A.A.F. 2012)).

[15] *Id. Perry*, 2012 CCA LEXIS 288, *24 (quoting *United States v. Humphries*, 71 M.J. 209, 215).

[16] *Id.* (emphasis added).

APPENDIX A: COMPARISON OF 2007 R.M.C. 307(C)(3) AND 2008 R.C.M. 307(C)(3)

R.M.C. 307(C)(3) (2007)	R.C.M. 307(C)(3) (2008)
Rule 307. Swearing of charges (c) *How to allege offenses.* (1) *In general.* The format of charge and specification is used to allege violations of the M.C.A. (2) *Charge*. A charge states the punitive article of the Act, law of war, or offense as defined in this Manual that the accused is alleged to have violated. (3) *Specification*. A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. Except for aggravating circumstances under R.M.C. 1001(b)(2), facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required. (4) *Multiple offenses*. Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense. What is substantially one transaction should not be the basis for an unreasonable multiplication of charges against one person. (5) *Multiple offenders*. A specification may name more than one person as an accused if each person so named is believed by the accuser to be a principal in the offense that is the subject of the specification.	**Rule 307. Preferral of charges** (c) *How to allege offenses.* (1) *In general.* The format of charge and specification is used to allege violations of the [U.C.M.J.] (2) *Charge*. A charge states the article of the code, law of war, or local penal law of an occupied territory which the accused is alleged to have violated. (3) *Specification.* A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. Except for aggravating factors under R.C.M 1003(d) and R.C.M. 1004, facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required. (4) *Multiple offenses.* Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense. What is substantially one transaction should not be made the basis for an un reasonable multiplication of charges against one person. (5) *Multiple offenders.* A specification may name more than one person as an accused if each person so named is believed by the accuser to be a principal in the offense which is the subject of the specification.

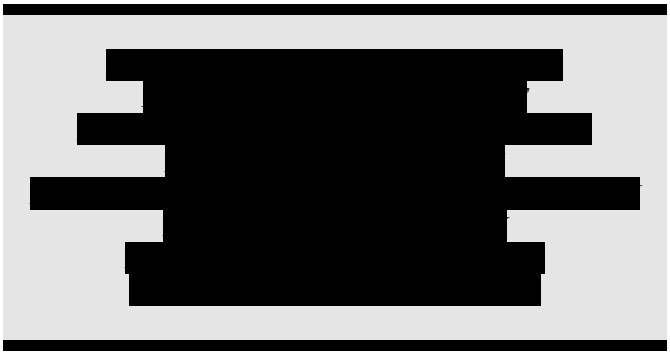
APPENDIX B: EXCERPT OF DISCUSSION SECTION TO R.C.M 307(C)(3)

(G) *Description of offense.*

(i) *Elements.* The elements of the offense must be alleged, either expressly or by necessary implication. If a specific intent, knowledge, or state of mind is an element of the offense, it must be alleged.

(ii) *Words indicating criminality.* If the alleged act is not itself an offense but is made an offense either by applicable statute (including Articles 133 and 134), or regulation or custom having the effect of law, then words indicating criminality such as " wrongfully, " "unlawfully," or "without authority" (depending upon the nature of the offense) should be used to describe the accused's acts.

(iii) *Specificity.* The specification should be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy. Only those facts that make the accused's conduct criminal ordinarily should be alleged. Specific evidence supporting the allegations ordinarily should not be included in the specifications.



Office of the Chief Prosecutor of Military Commissions
United States Department of Defense

M E M O R A N D U M

TO: Mr. Haridimos Thravalos, Chief of Motions and Appeals Section

FROM: Major Christopher J. Pirog, Motions and Appeals Section

RE: Analysis of the meaning of the phrase "where applicable" in 10 U.S.C. Section 950g(a)

DATE: September 26, 2022

I. INTRODUCTION

This Memorandum analyzes the meaning of the phrase "where applicable" as drafted in 10 U.S.C. Section 950g(a) ("Section 950g(a)"). This question was presented through a line of questioning by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") panel, during oral argument in [redacted] *v. United States* on [redacted]. Section II of this memo summarizes the oral argument. Section III presents brief legislative history. Section IV offers analysis. Section V provides concluding thoughts. Appendix A contains excerpt of the text of the statutes for a complete side-by-side comparison of the 2009 and 2011, 10 U.S.C. Section 950g.

II. ORAL ARGUMENT

A. "Where Applicable" Phrase Issue

At the oral argument, during the Court's colloquy with Petitioner's Counsel, the Court asked counsel to interpret the "work performed" by the phrase "where applicable" in Section 950g(a).[1] The Court stated that the way they read Section 950g(a) "there are three conditions precedent to [the D.C. Circuit's] jurisdiction."[2] First, there must be a final judgment rendered by a military commission.[3] Second, the final judgment needs to be approved by the Convening Authority.[4] And third, that the final judgment needs to have been either "affirmed or set aside as incorrect" by the United States Court of Military Commission Review (U.S.C.M.C.R.).[5]

B. 10 U.S.C. Section 950g (2009) or 10 U.S.C. Section 950g (2011)

With respect to the Court's identification of the "third condition precedent," it appears the Court is referencing the wrong version of the statute that was in effect at the time of Petitioner's guilty plea. Specifically, the date of Petitioner's guilty plea was [redacted].[6] As discussed, *infra* at section III, in 2011, Congress amended 10 U.S.C. Section 950g(a), inserting the phrase "as affirmed or set aside as incorrect in law by" in the subsection. While likely immaterial to this memorandum's analysis, there does not appear to be a "third condition precedent" in the way that the Court identifies, in the statute that was in effect at the time of Petitioner's guilty plea.[7] However, the question still remains as to what the phrase "where applicable" means. During oral

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[1] *See* UNOFFICIAL TRANSCRIPT OF ORAL ARGUMENT, [redacted] *V. UNITED STATES*, NO. [redacted] (D.C. CIR. [redacted]) ([redacted], [redacted], AND [redacted], JJ.) at 4.

[2] *Id*.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* at 7.

[7] *See* Section III for further analysis.

argument, Petitioner's Counsel also conceded this fact, stating that the meaning of this phrase remains an "open question."[8]

C. Petitioner's Counsel Position

Petitioner's Counsel argued that the phrase "where applicable" should be read under its "plain language," and that the phrase should be interchangeable with the phrase "relevant to."[9] Petitioner's Counsel further stated that the phrase also recognized a circumstance that permits the accused to skip review by the U.S.C.M.C.R.[10]

D. The United States' Position

The United States stated that the Government interprets the phrase "where applicable" to "refer to a decision by the [U.S.C.M.C.R.] where the [U.S.C.M.C.R.] has determined its review is not applicable, or in other words a determination that it lacks jurisdiction."[11] The United States provided that, "if the [U.S.C.M.C.R] had dismissed [Petitioner's] appeal for lack of referral by the Convening Authority in a way that made it clear that it was terminating the case in the military commission system, then that would have amounted to a determination by the [U.S.C.M.C.R] that its review was not applicable."[12] According to the United States, this would have then triggered the D.C. Circuit's appellate review jurisdiction.[13]

III. LEGISLATIVE HISTORY

10 U.S.C. Section 950g(a), of the 2009 Military Commissions Act (M.C.A.) originally provided that:

> EXCLUSIVE APPELLATE JURISDICTION.—Except as provided in subsection (b), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as

[8] *Id.* at 4.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 5.

[12] *Id.*

[13] *Id.*

> approved by the convening authority and, where applicable, the United States Court of Military Commission Review) under this chapter.[14]

In 2011, Congress amended the 2009 M.C.A., including 10 U.S.C. Section 950g.[15] As such, 10 U.S.C. Section 950g(a) now provides that:

> EXCLUSIVE APPELLATE JURISDICTION.—Except as provided in subsection (b), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review) under this chapter.[16]

As discussed *infra*,[17] when Congress amended Section 950g in 2011, it simultaneously modified Sections 950g(a) and (c).[18] It does not appear that the additional language that the Court identifies (i.e. "as affirmed or set aside as incorrect in law by") changes the meaning of the phrase "where applicable." Simply put, the additional phrase "as affirmed or set aside as incorrect in law by" merely clarifies the U.S.C.M.C.R.'s role in the appellate process. The original version of the statute could lead the reader to assume that the U.S.C.M.C.R. also "approves" a final judgment, in addition to the Convening Authority. However, as 10 U.S.C. Section 950b(c)(3)(C) makes clear, the function of approving a final judgment comes from the Convening Authority's discretionary authority to review a final judgment.[19] As further evidence of this interpretation, 10 U.S.C. Section

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[14] 10 U.S.C. 950g(a) (2009) (emphasis added).

[15] *See* Appendix A, *infra*, for complete side-by-side comparison of 2009 and 2011, 10 U.S.C. Section 950g.

[16] 10 U.S.C. 950g(a) (2011) (emphasis added).

[17] *See* footnote 28, and Section V.

[18] The difference in language between the two statutes does not violate the *ex post* facto clause. *See Al Bahlul v. United States*, 767 F.3d 1, 19 (2014) ("[t]he right to jury trial provided by the Sixth Amendment is obviously a 'substantial' one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* clause.") (emphasis added, internal citations omitted).

[19] "In taking action . . . the convening authority may, in the sole discretion of the convening authority, approve, disapprove, commute, or suspend the sentence in whole or in part." Title 10, Section 950b(c)(3)(C).

950c(a) recognizes that the U.S.C.M.C.R.'s appellate review jurisdiction attaches in cases where a final guilty decision of a military commission is reached, is "approved" by the Convening Authority and duly referred. In summation, the additional language clarifies that the U.S.C.M.C.R. plays no role in "approving" a final judgment.

IV. ANALYSIS[20]

It is likely that the "where applicable" phrase was drafted to recognize circumstances where there may or may not be U.S.C.M.C.R. review, prior to the D.C. Circuit obtaining jurisdiction. While not directly on point, evidence of this interpretation can be found in 10 U.S.C. Section 950g(c). Specifically, Section 950g(c) identifies the filing prerequisites that a petitioner must satisfy before requesting review by the D.C. Circuit.[21] The petitioner must first demonstrate that the U.S.C.M.C.R. has served the parties with written notice of its final decision.[22] In this circumstance, the petitioner must file their petition with the D.C. Circuit no later than twenty days after receiving written notice.[23] The second circumstance pertains to whether the petitioner has submitted a written notice waiving their right to review by the U.S.C.M.C.R.[24] In this circumstance, the petitioner must file their petition, again with the D.C. Circuit, no later than twenty days after the date on which such written notice, waiving their right to review by the U.S.C.M.C.R, is submitted.[25]

In other words, the phrase "where applicable" contemplates that there are at least two circumstances where the D.C. Circuit's jurisdiction can attach. One where the U.S.C.M.C.R. does

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[20] The phrase "where applicable" does not appear anywhere else within the Military Commissions Act of 2009, or as amended in 2011. Furthermore, the statutory definitions section, found in 10 U.S.C. 948a, also does not define the phrase.

[21] As discussed in Section III, *supra*, in 2011 Congress amended 10 U.S.C. Section 950g. While Section 950g(c) was also amended, the amendment was mainly to form and not to substance.

[22] 10 U.S.C. Section 950g(c)(1).

[23] 10 U.S.C. Section 950g(c)(1).

[24] 10 U.S.C. Section 950g(c)(2).

[25] 10 U.S.C. Section 950g(c)(2).

perform appellate review, and the other where the U.S.C.M.C.R. does not. This distinction is important, because Section 950g(b) specifically provides that "[t]he [D.C. Circuit] may not review a final judgment described in subsection (a) until all other appeals under this chapter have been waived or exhausted."[26] However, as contemplated in Section 950g(a), in cases "where applicable" that the U.S.C.M.C.R. does not perform appellate review, the petitioner can still obtain D.C. Circuit review if the petitioner submits written notice waiving their right to review by the U.S.C.M.C.R, and files their petition with the D.C. Circuit, no later than twenty days after the date on which such notice is submitted.[27]

V. CONCLUSION

A review of the oral argument transcript indicates that the Court is likely leaning towards the United States' view that the phrase "where applicable" should be narrowly construed for two reasons. First, the context and structure of Section 950g allows interpretation of the phrase "where applicable" simply by analyzing the whole section and its components within itself. Second, a review of the statutory history shows that when Congress in 2011 amended Section 950g it did so by modifying 950g(a) and (c) at the same time, which suggests that Congress intended for the phrase "where applicable" to be interpreted by understanding that the two subsections function together.

[26] This language is identical in both the 2009 and 2011 versions of 10 U.S.C. 950g(b).

[27] 10 U.S.C. Section 950g(c)(2).

APPENDIX A: COMPARISON OF 10 U.S.C Section 950g (2009) AND 10 U.S.C. Section 950g (2011)[28]

(Changes in text have been highlighted and underlined for comparison)

10 U.S.C Section 950g (2009)	10 U.S.C. Section 950g (2011)
§ 950g. Review by United States Court of Appeals for the District of Columbia Circuit; writ of certiorari to Supreme Court	**§ 950g. Review by United States Court of Appeals for the District of Columbia Circuit; writ of certiorari to Supreme Court**
(a) Exclusive appellate jurisdiction. Except as provided in subsection (b), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, the United States Court of Military Commission Review) under this chapter.	**(a) Exclusive appellate jurisdiction.** Except as provided in subsection (b), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review) under this chapter.
(b) Exhaustion of other appeals. The United States Court of Appeals for the District of Columbia Circuit may not review a final judgment described in subsection (a) until all other appeals under this chapter have been waived or exhausted.	**(b) Exhaustion of other appeals.** The United States Court of Appeals for the District of Columbia Circuit may not review a final judgment described in subsection (a) until all other appeals under this chapter have been waived or exhausted.
(c) Time for seeking review. A petition for review by the United States Court of Appeals for the District of Columbia Circuit must be filed by the accused in the Court of Appeals not later than 20 days after the date on which—	**(c) Time for seeking review.** A petition for review by the United States Court of Appeals for the District of Columbia Circuit must be filed in the Court of Appeals—
(1) written notice of the final decision of the United States Court of Military	(1) not later than 20 days after the date on which written notice of the final decision of the

[28] Pertaining to the differences relating to 2009 Title 10, Section 950g, and Title 10, Section 950g, as amended in 2011, Congress, in subsection (a), inserted "as affirmed or set aside as incorrect in law by"; and in subsection (c), in the introductory matter, substituted "in the Court of Appeals—" for "by the accused in the Court of Appeals not later than 20 days after the date on which—", and In para. (c)(1), inserted "not later than 20 days after the date on which", and substituted "on the parties" for "on the accused or on defense counsel", and in para. (c)(2), inserted "if" and ", not later than 20 days after the date on which such notice is submitted".

Commission Review is served on the accused or on defense counsel; or	United States Court of Military Commission Review is served on the parties; or
(2) the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the United States Court of Military Commission Review.	(2) if the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the United States Court of Military Commission Review, not later than 20 days after the date on which such notice is submitted.
(d) Scope and nature of review. The United States Court of Appeals for the District of Columbia Circuit may act under this section only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review, and shall take action only with respect to matters of law, including the sufficiency of the evidence to support the verdict.	**(d) Scope and nature of review.** The United States Court of Appeals for the District of Columbia Circuit may act under this section only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review, and shall take action only with respect to matters of law, including the sufficiency of the evidence to support the verdict.
(e) Review by Supreme Court. The Supreme Court may review by writ of certiorari pursuant to section 1254 of title 28 the final judgment of the United States Court of Appeals for the District of Columbia Circuit under this section.	**(e) Review by Supreme Court.** The Supreme Court may review by writ of certiorari pursuant to section 1254 of title 28 the final judgment of the United States Court of Appeals for the District of Columbia Circuit under this section.

Applicant Details

First Name	**Mallorie**
Last Name	**Sckerl**
Citizenship Status	**U. S. Citizen**
Email Address	**scker001@umn.edu**
Address	**Address** Street **1126 Fifth St. SE** City **Minneapolis** State/Territory **Minnesota** Zip **55414** Country **United States**
Contact Phone Number	**319-830-4824**

Applicant Education

BA/BS From	**University of Nebraska-Lincoln**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Minnesota Law School** **http://www.law.umn.edu**
Date of JD/LLB	**May 11, 2024**
Class Rank	**50%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Lacy, Ben
blacy@tubman.org
320-288-6751
Anguiano, Nadia
angui010@umn.edu

References

Seiko Shastri
shast009@umn.edu; 612-625-6484

Professor Christopher Roberts
cnr@umn.edu; 612-624-2947

Nick Hittler
Nicholas.Hittler@usdoj.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MALLORIE SCKERL
1126 5th St. SE, Minneapolis, MN 55414
319-830-4824 | scker001@umn.edu

July 23, 2023

The Honorable Judge James O. Browning
U.S. District Court, District of New Mexico
Pete V. Domenici United States Courthouse
333 Lomas Blvd. NW, Suite 660
Albuquerque, New Mexico 87102

Dear Judge Browning,

I am a rising third-year law student at the University of Minnesota and am excited to apply for a clerkship in your chambers for the 2024-2025 term. I am interested in clerking with the U.S. District Court for the District of New Mexico because I am drawn to the wide variety of cases the District Court sees every day and would love to delve deeper into issues of both civil and criminal law. My extensive experiences in research and writing, strong analytical skills, and deep intellectual curiosity have prepared me for the exciting challenges of a judicial clerkship in your chambers.

My experiences so far in law school demonstrate my dedication to developing my skills through taking on difficult issues. By serving as a certified student attorney in my school's Federal Immigration Litigation Clinic, I have taken the lead on complex immigration cases both at the agency level and on review by the federal courts. Recently, the Eighth Circuit Court of Appeals granted a Petition for Panel Rehearing that I co-authored regarding post-conviction relief and equitable tolling. I have continued this type of work over the summer as an intern with the Fort Snelling Immigration Court, where I work closely with Immigration Judges to draft decisions on the removability of noncitizens and applications for relief, as well as pre-hearing motions and bench memoranda. One of the best parts of working with the Immigration Court this summer has been observing how many different attorneys approach similar issues and cases. I have been exposed to a tremendous amount of "good lawyering" – and some not-so-good lawyering – in this role, and a federal clerkship would provide a similar opportunity to learn through observation, which I have found invaluable at the agency level.

I am also thrilled to have been selected as a member of the Minnesota Law National Moot Court Competition Team for the upcoming academic year. As part of this team, I will work closely with two other students to co-author a brief to the Supreme Court about pressing constitutional questions and compete in several rounds of oral arguments before esteemed attorneys and judges. I greatly enjoyed participating in moot court as a second-year student and am excited to continue on next year.

In addition to my academic pursuits, I have been fortunate to work at a local nonprofit litigating on behalf of victim-survivors of trauma seeking Orders for Protection and Harassment Restraining Orders. In this role, I have had the opportunity to take on my own cases, preparing witnesses, conducting direct- and cross-examinations in evidentiary hearings, and authoring memoranda to be filed with the Court. After law school, I hope to combine my interests in courtroom litigation, client work, and research- and writing-intensive projects in a career in public interest or

MALLORIE SCKERL
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government work. Serving as a clerk in your chambers would be a wonderful way to continue honing my skills while also continuing to serve my community.

Included in my application, you will find my resume, writing sample, transcripts, and letters of recommendation from professors and employers. Thank you very much for your time and consideration. I look forward to hearing from you soon!

Sincerely,

Mallorie Sckerl
JD Candidate, 2024
University of Minnesota

MALLORIE SCKERL

1126 5th St. SE, Minneapolis, MN 55414
319-830-4824 | scker001@umn.edu

EDUCATION

University of Minnesota Law School, Minneapolis, MN
Juris Doctor | Anticipated May 2024
GPA: 3.453/4.333
Awards: Special Topics in Administrative Law Book Award, Dean's List, Dean's Distinguished Scholarship, New Edison Public Interest Scholarship
Activities: National Moot Court Competition Team; Gamma Eta Gamma Legal Fraternity, Treasurer; Theater of the Relatively Talentless, Cast Member, Head Producer; Women's Law Student Association, Member

University of Nebraska-Lincoln, NE
Bachelor of Arts in Psychology and English | *Highest Distinction & Honors* | May 2021
Minors: Criminology & Criminal Justice and Political Science
Honors: University Honors Program; Undergraduate Creative Activities & Research Experience Grant; Dean's List
Activities: Honors Program Student Advisory Board, President; Chancellor's Student Committee on Sexual Misconduct, Representative; Chancellor's Commission on the Status of Women, Representative
Thesis: Psychological development of sexual assault offenders in positions of power in religious organizations

EXPERIENCE

Federal Immigration Litigation Clinic | **University of Minnesota Law School**, Minneapolis, MN
Clinic Student Director, Certified Student Attorney | August 2023-May 2024
Certified Student Attorney | August 2022-May 2023
Leads and assists with complex immigration litigation at the Immigration Court, Board of Immigration Appeals, and Eighth Circuit regarding asylum application issues and post-conviction relief. Assisted on Amicus Curia Brief for Eleventh Circuit. Develops practical knowledge of administrative, immigration, criminal, and constitutional law.

Immigration Court | **Executive Office of Immigration Review, US Dept. of Justice,** Ft. Snelling, MN
Summer Law Intern | May 2023-August 2023
Drafts decisions and motions in immigration proceedings, including various types of removal and relief. Performs complex legal analysis regarding the intersection of criminal and immigration law. Reviews evidence and testimony. Makes recommendations to Immigration Judges and Attorney Advisors. Engages in weekly roundtable discussions on various topics in immigration law.

Tubman | **Nonprofit Serving Victims of Domestic Violence, Sexual Assault, Trauma**, Minneapolis, MN
Certified Student Attorney, Contract Law Clerk | August 2022-May 2023
Minnesota Justice Foundation Fellow | April 2022-August 2022
Lead evidentiary hearings for Orders for Protection and Harassment Restraining Orders. Hosted clinics for pro se clients seeking OFPs and HROs. Authored motions and memoranda of law. Screened clients to recommend family law services.

MALLORIE SCKERL

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Lincoln Commission on Human Rights | **City of Lincoln**, Lincoln, NE
Housing Rights Intern | April 2021-August 2021
Performed intake interviews and processed applications for emergency rental assistance. Hosted community outreach events. Observed eviction court hearings. Reviewed discrimination investigation reports. Observed monthly commission meetings.

Psychosocial Development of Sexual Offenders Research Group | **Dr. Lisa Sample**, Lincoln, NE
Qualitative Researcher | April 2019-May 2021
Conducted and transcribed qualitative interviews. Researched and analyzed data on sexual malfeasance for thesis.

Voices of Hope | **Sexual Assault & Domestic Violence Crisis Center**, Lincoln, NE
Volunteer | November 2019-April 2021
Answered calls and completed training on intimate partner violence, mental health awareness, trauma-informed response strategies, and local resources.

Nebraska Attorney General | **Consumer Protection**, Lincoln, NE
Mediator | August 2020-April 2021
Reviewed complaints and mediated resolution process. Educated consumers on protection from scams and identity theft. Responded to questions and concerns. Developed new protocols and education strategies with team.

Nebraska State Legislature | **State Senate**, Lincoln, NE
Unicameral Legislative Page | January 2020-August 2020
Responded to state senator requests, performed administrative duties with Clerk of the Legislature, and planned meetings.

INTERESTS
Playing guitar and singing; jogging; reading memoirs

University of Minnesota Unofficial Transcript

Name : Sckerl,Mallorie Rose
Student ID : 5752663
Birthdate : 1 - 23

Print Date: 06/27/2023

MOST RECENT PROGRAMS

Campus : University of Minnesota, Twin Cities
Program : Law School
Plan : Law J D
Degree Sought : Juris Doctor

* * * * * **Beginning of Law Record** * * * * *

Fall Semester 2021
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6001	Contracts	4.00	4.00	B	12.000
LAW	6002	Legal Research & Writing	2.00	2.00	P	0.000
LAW	6005	Torts	4.00	4.00	A	16.000
LAW	6006	Civil Procedure	4.00	4.00	B+	13.332
LAW	6007	Constitutional Law	3.00	3.00	B+	9.999
TERM GPA :	3.422	TERM TOTALS :	17.00	17.00	15.00	51.331

Spring Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6002	Legal Research & Writing	2.00	2.00	P	0.000
LAW	6004	Property	4.00	4.00	B+	13.332
LAW	6009	Criminal Law	3.00	3.00	B+	9.999
LAW	6013	Law in Practice: 1L	3.00	3.00	P	0.000
LAW	6018	Legislation and Regulation: 1L	3.00	3.00	B	9.000
TERM GPA :	3.233	TERM TOTALS :	15.00	15.00	10.00	32.331

Fall Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6219	Evidence	3.00	3.00	B	9.000
LAW	6229	Criminal Procedure: Adjudicatn	3.00	3.00	A-	11.001
LAW	6651	Special Topics in Admin Law	3.00	3.00	A+	12.999
LAW	7042	CL: Fed Immigration Litigation	4.00	4.00	A	16.000
LAW	7065	National Moot Court	1.00	1.00	A-	3.667
TERM GPA :	3.762	TERM TOTALS :	14.00	14.00	14.00	52.667

Spring Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6084	Equal Protection	3.00	3.00	B	9.000
LAW	6629	Indian Law	2.00	2.00	B	6.000
LAW	6661	PR - General	3.00	3.00	B-	8.001
LAW	6834	Federal Habeas Corpus	2.00	2.00	A	8.000
LAW	7042	CL: Fed Immigration Litigation	3.00	3.00	A	12.000
LAW	7065	National Moot Court	1.00	1.00	A-	3.667
TERM GPA :	3.333	TERM TOTALS :	14.00	14.00	14.00	46.668

Fall Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6152	Federal Jurisdiction	3.00	0.00		0.000
LAW	6604	Family Law	3.00	0.00		0.000
LAW	6611	International Criminal Law	3.00	0.00		0.000
LAW	6906	Public Law Workshop	2.00	0.00		0.000
LAW	7043	CL: Federal Immig Director	3.00	0.00		0.000
LAW	7068	Nat'l Mt Ct Competition Team	1.00	0.00		0.000
TERM GPA :	0.000	TERM TOTALS :	15.00	0.00	0.00	0.000

Law Career Totals

CUM GPA:	3.453	UM TOTALS:	75.00	60.00	53.00	182.997
		UM + TRANSFER TOTALS:		60.00		

***** End of Transcript *****

Unofficial UNL Undergraduate Academic Record

Name: Mallorie Rose Sckerl
Student ID: 29919053

Institution Info: University of Nebraska - Lincoln
Print Date: 02/01/2022

Credentials Awarded

Credential: Bachelor of Arts
Confer Date: 05/08/2021
Degree GPA: 3.966
Honors: Highest Distinction
Honors: University Honors Program
Major: Psychology
Major: English
Minor: Criminology & Criminal Justice
Minor: Political Science

Other Institutions Attended:

Cedar Falls HS
Hawkeye CC

Beginning of Undergraduate Record

Spring 2017

CRIM	101	SURVEY CRIMINAL JUS	A	3.00	12.00

Transfer Credit from Hawkeye CC

	FUND OF ORAL COMM	A	3.00
	INTRO TO SOCIOLOGY	A	3.00
Transfer Totals:			6.00

	AHRS	EHRS	QHRS	QPTS	GPA
Term	3.00	3.00	3.00	12.00	4.000
Transfer	6.00	6.00			
Combined	9.00	9.00	3.00	12.00	4.000
Cumulative	9.00	9.00	3.00	12.00	4.000

Program: Visiting Student
Major: Visiting

Fall 2017

CASC	191	SPECIAL TOPICS:ARTS&SCI	P	0.00	
		Arts & Sciences Start Smart			
CRIM	203	POLICE AND SOCIETY	A+	3.00	12.00
CRIM	211	CRIMINAL COURT SYSTM	A+	3.00	12.00
ENGL	151	WRITING AND ARGUMENT	A+	3.00	12.00
		Honors Course			
ENGL	189H	UNIV HONORS SEMINAR	A+	3.00	12.00
		Art&Srch for Meaning in Am Lfe			
PSYC	100	CAREER PLNNG FOR PSY	P	1.00	
PSYC	288	PSY OF SOC BEHAVIOR	A+	3.00	12.00
UHON	98H	HONORS FORUM	P	0.00	
		Peer Mentor Program			

Test Credits:

English Literature	3.00
English Language & Comp	3.00
Government & Politics: U.S.	3.00
Mathematics: Calculus AB	5.00
Psychology	4.00
Test Credits Total:	18.00

	AHRS	EHRS	QHRS	QPTS	GPA
Term	16.00	16.00	15.00	60.00	4.000
Transfer	18.00	18.00			
Combined	34.00	34.00	15.00	60.00	4.000
Cumulative	43.00	43.00	18.00	72.00	4.000

Program: Arts & Sciences Undergraduate
Major: Psychology
Minor: Political Science
Minor: Criminology & Criminal Justice
Minor: English

Spring 2018

ENGL	253	INTRO POETRY WRITING	A	3.00	12.00
GEOG	155	ELEM PHYSICAL GEOG	A+	4.00	16.00
POLS	160H	INTERNATNL RELATIONS	B+	3.00	9.99
PSYC	263	INTRO COGNITIVE PROC	A	3.00	12.00
PSYC	273	BRAIN & BEHAVIOR	A	3.00	12.00

	AHRS	EHRS	QHRS	QPTS	GPA
Term	16.00	16.00	16.00	61.99	3.874
Cumulative	59.00	59.00	34.00	133.99	3.940

Program: Arts & Sciences Undergraduate
Major: Psychology
Minor: Political Science
Minor: Criminology & Criminal Justice
Minor: English

Fall 2018

CRIM	338	RACE, ETHN&CRIM JUS	A	3.00	12.00
ENGL	231H	HON:ENGL AUTHR>1800	A	3.00	12.00
ENGL	315B	WOMEN IN POP CULTURE	A+	3.00	12.00
PSYC	289	DEVELOPMENTAL PSYCH	A+	3.00	12.00
PSYC	350	RSH AND DATA ANALYSIS	A	4.00	16.00

	AHRS	EHRS	QHRS	QPTS	GPA
Term	16.00	16.00	16.00	64.00	4.000
Cumulative	75.00	75.00	50.00	197.99	3.959

Program: Arts & Sciences Undergraduate
Major: Psychology
Minor: Political Science
Minor: Criminology & Criminal Justice
Minor: English
Honors: University Honors Program

Unofficial UNL Undergraduate Academic Record

Name: Mallorie Rose Sckerl
Student ID: 29919053

Spring 2019

ENGL	230	ENGL AUTHORS <1800	A+	3.00	12.00
PSYC	310	PSYCH OF IMMIGRATION	A+	3.00	12.00
PSYC	401	PSYCHOLOGY & LAW	A+	3.00	12.00
PSYC	421	PSYCHOLOGY OF GENDER	A+	3.00	12.00
UHON	395H	UNIV HONORS SMNR	A+	3.00	12.00
		Coming of Age in Am. Life			

	AHRS	EHRS	QHRS	QPTS	GPA
Term	15.00	15.00	15.00	60.00	4.000
Cumulative	90.00	90.00	65.00	257.99	3.969

Program: Arts & Sciences Undergraduate
Major: Psychology
Major: English
Minor: Criminology & Criminal Justice
Honors: University Honors Program

Fall 2019

CRIM	451	VIOLENCE	A+	3.00	12.00
ENGL	200	INTRO ENGL STUDIES	A	3.00	12.00
ENGL	332	AMER AUTHORS <1900	A+	3.00	12.00
ENGL	345D	CHICANA/CHICANO LIT	A	3.00	12.00
PSYC	483	ADV SOCIAL PSYCHOLOGY	A+	3.00	12.00
UHON	99H	HONORS EXPERIENCE	P	0.00	
		Teaching & Mentoring			

	AHRS	EHRS	QHRS	QPTS	GPA
Term	15.00	15.00	15.00	60.00	4.000
Cumulative	105.00	105.00	80.00	317.99	3.974

Program: Arts & Sciences Undergraduate
Major: Psychology
Major: English
Minor: Criminology & Criminal Justice
Honors: University Honors Program

Spring 2020

CRIM	480	SP PRBLMS CRIM JUS	A	3.00	12.00
		Sexual Violence			
ENGL	376	RHETORIC:ARGUMNT&SOC	A	3.00	12.00
ENGL	414	WOMENS LITERATURE	A	3.00	12.00
		19th Century American Women's			
PSYC	471	HUMAN SEXUALITY&SOC	A+	3.00	12.00
UHON	99H	HONORS EXPERIENCE	P	0.00	
		Internship			

	AHRS	EHRS	QHRS	QPTS	GPA
Term	12.00	12.00	12.00	48.00	4.000
Cumulative	117.00	117.00	92.00	365.99	3.978

Program: Arts & Sciences Undergraduate
Major: Psychology
Major: English
Minor: Criminology & Criminal Justice
Honors: University Honors Program

Fall 2020

ENGL	305A	NOVEL 1700-1900	A	3.00	12.00
ENGL	445B	TOPICS:AFRICAN-AM LIT	A-	3.00	11.01
		Race, Law, & Literature			
ENGL	465	19TH C BRITISH LIT	A	3.00	12.00
		The Dark Side of Children's Li			
POLS	345	COURTS JUDGES&LAWYER	A	3.00	12.00
POLS	441	CONSTITUTIONAL LAW	A+	3.00	12.00

	AHRS	EHRS	QHRS	QPTS	GPA
Term	15.00	15.00	15.00	59.01	3.934
Cumulative	132.00	132.00	107.00	425.00	3.971

Program: Arts & Sciences Undergraduate
Major: Psychology
Major: English
Minor: Criminology & Criminal Justice
Minor: Political Science
Honors: University Honors Program

Spring 2021

ENGL	487	ENGL CAPSTONE EXPRNC	A	3.00	12.00
		Growing Up w/ Charlotte Bronte			
POLS	347	MYTH&REALITY JUST SYS	A	3.00	12.00
POLS	442	CIV LIB: EXPRESSION	A-	3.00	11.01
POLS	443	CIVIL LIB: FAIRNESS	A+	3.00	12.00
UHON	99H	HONORS EXPERIENCE	P	0.00	
		Internship			

	AHRS	EHRS	QHRS	QPTS	GPA
Term	12.00	12.00	12.00	47.01	3.917
Cumulative	144.00	144.00	119.00	472.01	3.966

Program: Arts & Sciences Undergraduate
Major: Psychology
Major: English
Minor: Criminology & Criminal Justice
Minor: Political Science
Honors: University Honors Program

Undergraduate Career Totals

Cumulative	AHRS	EHRS	QHRS	QPTS	GPA
Enrollment	120.00	120.00	119.00	472.01	3.966
Transfer	24.00	24.00			
Combined	144.00	144.00	119.00	472.01	3.966

End of Unofficial UNL Undergraduate Academic Record

Tubman

Dear Judge Browning:

I write to lend my recommendation for Mallorie Sckerl to be a law clerk as her supervising attorney for more than a year. Mallorie is an exemplary law student and enthusiastic learner. Mallorie has provided consistently exceptional and dogged advocacy for every client she has worked with at Tubman.

Mallorie backs up her skills in the courtroom with clear and creative writing that never fails to get her point across. She has written memoranda, case assessments, trial notes, trial preparation documents, subpoenas, motions, and more. Being her supervising attorney I have reviewed all of it and can say without a doubt Mallorie is not only highly effective, she also has the instincts that cannot be taught.

Mallorie has proved herself to be a committed and involved resource through her time at Tubman. She started by shadowing and working on protective orders. In doing so, she provided trauma-informed and client-oriented services to several clients. Clients have regularly described Mallorie as attentive and caring.

Mallorie next had the opportunity to work on more family law/divorce oriented work and shadowed her first trial. She provided essential support to a contract attorney at Tubman and together they achieved outstanding results for the client.

After getting a taste for trial Mallorie signed up for significantly more trial oriented work at Tubman and coursework in Law School. The result was Mallorie sitting second chair at one of the most complex Harassment Restraining Order cases that we've ever been a part of at Tubman. The opposing party in the HRO was represented by the Minnesota Attorney General's Office and the trial lasted two days. Mallorie poured hundreds of hours into this case representing a woman who identifies as a black indigenous person and who is temporarily housed in the Shakopee Women's Correctional Facility. Mallorie's work and commitment on this case was nothing short of truly unheard of for an attorney, let alone a law student.

Tubman

Get Help: 612.825.0000
Give Help: 612.825.3333
tubman.org

Tubman Chrysalis Center
4432 Chicago Ave S
Minneapolis, MN 55407

Harriet Tubman Center East
1725 Monastery Way
Maplewood, MN 55109

Since this case, Mallorie has helped pilot a new protective order law clinic program, providing brief clinics to clients having procedural and legal questions about protective orders. The result has been a resounding success.

Mallorie continues to zealously advocate for clients who are truly in need of Tubman's services. She regularly catches nuances that are both intricate and informative. Because of this, we are able to provide precision services to the most clients. It is hard to understate how effective Mallorie has been, but please suffice it to say that she is a deserving candidate for a Supreme Court Clerkship.

Kindly,

/s/ Benjamin J.M. Lacy

Ben Lacy, Esq.
Managing Attorney
(320) 288-6751

July 26, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I write to give an enthusiastic recommendation to Mallorie Sckerl for a clerkship in your chambers.

I am an associate professor of clinical law at the James H. Binger Center for New Americans at the University of Minnesota Law School. I direct and teach the Federal Immigration Litigation Clinic. By way of background, our clinic engages law students in complex, high-impact litigation before immigration courts, the Board of Immigration Appeals (BIA), U.S. district courts, U.S. courts of appeals, and the U.S. Supreme Court. The larger Binger Center is home to three additional clinics that represent persons detained by Immigration and Customs Enforcement, asylum seekers, and noncitizens in rural areas of Minnesota. I also teach a non-clinical course on post-conviction remedies and relief.

Both semesters this past academic year, Mallorie was a certified 2L student attorney with my clinic. Her performance was excellent, so I invited her to return as a 3L student director for the upcoming 2023-2024 academic year. She accepted the offer. I will therefore be her professor and immediate clinical supervisor for two full years during her time at Minnesota Law.

Mallorie worked on two complex case projects in her first year with the clinic. Starting last Fall, Mallorie and another clinic student began co-representing a long-term lawful permanent resident of the United States in one of the most intellectually challenging and complex cases our clinic has undertaken in recent years. Our clinic's representation of our client began in January 2021. Before Mallorie enrolled in the clinic in September 2022, we had secured a remand by the U.S. Court of Appeals for the Eighth Circuit in three consolidated petitions for review we had filed to challenge our client's removal order to South Sudan. Our clinic had also secured our client's release from prolonged immigration custody through a petition for a writ of habeas corpus before the U.S. District Court for the District of Minnesota. Our clinic's representation of this client therefore involved multiple intersecting areas of law—including constitutional law, administrative law, immigration law, and criminal law.

Mallorie had no prior exposure to the complex intersection of these areas of law, but she came up to speed notably quickly. Our clinic has a deserved reputation as a demanding academic undertaking, and for this reason the students who enroll tend to self-select from the higher tiers of their class. Within that context, Mallorie impressed me with the speed and efficiency with which she obtained, organized, and analyzed the voluminous records related to our client's immigration detention and deportation cases before federal courts.

Following our client's release from immigration custody and the Eighth Circuit's remand for a new removal hearing, Mallorie began drafting a sophisticated and high-stakes motion to change the venue of our client's removal case from Nebraska to Minnesota. The motion to change venue was far from simple. It implicated our client's due process right to a full and fair hearing, his right to have counsel in his removal case, and countervailing concerns regarding administrative efficiency. Mallorie digested and synthesized our client's lengthy and complicated federal cases and helped prepare a high-quality and persuasive motion that remains pending with the immigration court.

Mallorie's second clinic assignment began in January 2023 and has continued to grow in scope and complexity ever since. Mallorie's skill in handling her first clinic project led me to assign her to co-draft a petition for rehearing and rehearing en banc our clinic filed at a U.S. Court of Appeals. Among other complex tasks, Mallorie has had to wrestle with difficult jurisdictional questions, including the possible impact of the U.S. Supreme Court's then still-pending decision in *Santos-Zacaria v. Garland*, No. 21-1436 (U.S.), a case involving the statute providing for judicial review of administrative orders of removal. Petitions for rehearing are highly disfavored, but as a testament to the strength of Mallorie's work, the panel granted the petition for rehearing, vacated its prior judgment, and set the case for new briefing. When she returns next academic year, Mallorie will assist with the next steps in the case.

In closing, Mallorie has distinguished herself in her work as a clinical student attorney under my supervision. She is a person of high intelligence, maturity, and good judgment. I would rank her in the top 15-20% of all the law students I have taught in terms of analytical, research, and writing abilities. I would rank her just as highly or even higher with respect to her diligence, reliability, resourcefulness, and overall ability to organize and timely advance complex litigation projects. On top of all that, Mallorie is creative, witty, kind, and a pleasure to have around. As a former federal judicial law clerk, I have confidence Mallorie would be an effective law clerk if selected, so I recommend her enthusiastically and without reservation.

Please contact me anytime if you need more information. My email is angui010@umn.edu, my office phone number is (612) 301-8653, and my cell is (507) 261-2617.

Thank you for giving Mallorie's application your closest consideration.

Respectfully yours,

s/Nadia Anguiano

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Writing Sample

This writing sample is a paper I wrote for Federal Habeas Corpus, a seminar course I took in the spring of 2023. In this paper, I researched and analyzed historical statutes and cases, as well as public policy considerations, in a historical analysis that shows how habeas corpus was used to challenge the detentions of thousands of Cuban immigrants following the Mariel Boatlift of 1980. This sample represents some of my best academic work.

Because the prompt for our papers was so broad ("Write something about habeas corpus."), I begin with a brief explanation of the purpose of the paper, followed by significant legal and historical analysis.

Seeking the Great Writ:
Mariel Cubans, Habeas Corpus, and the Entry Fiction

Mallorie R. Sckerl

A Brief Note About This Paper

I stumbled across this paper topic completely by chance. I was half-listening to a podcast, waiting in the rain for the campus bus back in March when suddenly the words "habeas corpus" jumped out at me. I listened for a moment as the hosts began detailing a series of court cases involving immigrants seeking habeas relief, then quickly rewound to the beginning of the episode, listening closely this time around. By the end of the day, I had listened to that podcast episode two (and half) times. I would eventually listen to that episode – and a few others from the series – on repeat, each time shocked, disgusted, and disappointed by the treatment of the people at the heart of this story by each branch of the U.S. government.

The podcast, Season Two of National Public Radio's *White Lies,*[1] explores the history of the Mariel Boatlift of 1980, the arrival of thousands of refugees in Southern Florida, their treatment upon arrival, the indefinite detention of many, the eventual deportation of some, and much, much more. The hosts do a great job capturing the human side of the story, the excitement and tragedy and implausibility of it all. But they speak only briefly about the involvement of the courts in this saga, leaving me with many questions and even wondering if they had somehow misunderstood some of the litigation and legal-ese. (*The government couldn't have actually been that wrong – that cruel – right?)* And because I coincidentally had to write a paper about habeas corpus for class, I decided to dig in and learn more.

What I have read and learned through this project has amazed me, but there is still so much more information out there that I have yet to find. The litigation over the detention of the Mariel Cubans occurred across several district and circuit courts, spanned several decades, and

[1] *White Lies: The Pen,* Nat'l Pub. Radio (Feb. 23, 2023).

involved nearly 3,000 refugees seeking various kinds of relief. Telling the full story would require much more space than the twenty-odd pages allotted here, so readers should be aware that this is not an exhaustive analysis of the Mariel Boatlift or the habeas corpus litigation that followed. I have picked cases and incidences that summarize the experience of many of the detained Cuban refugees, as well as some that I find particularly compelling. And, while I have not completely sanitized this paper of all emotion or response to actions taken by different parties and individuals, this work is intended to be a historical overview and analysis, not a piece of persuasion or argument.

The Mariel Boatlift: History & Background[2]

In the late 1970s, many Cubans began seeking political asylum at foreign embassies located in Havana, a few even going so far as to attempt forcible entries at the Venezuelan and Peruvian embassies in 1979.[3] By the end of April 1980, more than 10,000 political dissidents had begun crowding into the embassies, hoping to leave the island and gain asylum somewhere – anywhere – else.[4]

A frustrated Fidel Castro announced on May 1, 1980, that he would open the port of Mariel for six months and allow anyone who could find their own transportation to leave Cuba.[5] Castro and other members of the Revolution wrote off dissidents attempting to leave as "trash," "criminals," "bums and parasites."[6] Cubans in Florida immediately began hiring local fishing boats and crews to go to Cuba and retrieve their family members and loved ones who had remained in the country. Days later, on May 5, President Jimmy Carter gave a speech at the

[2] The full story of the Cuban refugee crisis and Mariel Boatlift goes beyond the scope of this paper. For more information, I would highly recommend listening to the NPR podcast, *White Lies.*
[3] Karen Juanita Carrillo, *The Mariel Boatlift: How Cold War Politics Drove Thousands of Cubans to Florida in 1980,* The History Channel (Sept. 28, 2020).
[4] *Id.*
[5] *Id.*
[6] *Id.*

League of Women Voters national convention in which he pledged U.S. support to those attempting to flee Cuba: "We are the most generous nation on Earth in receiving refugees, and I feel very deeply that this commitment should be maintained…[W]e'll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation."[7] In addition to expanding the operations already underway at Eglin Air Force Base to receive and process refugees, the President stated that he would ask Congress for additional aid to support resettlement efforts.[8]

Between May and September, approximately 125,000 Cuban refugees[9] arrived in Southern Florida in what is commonly referred to as the "Mariel boatlift" or the "Freedom Flotilla."[10] As they arrived, the Cubans were processed by members of the Immigration and Naturalization Service ("INS") and the Department of Justice ("DOJ"), but officials were understandably ill-equipped to handle this large influx of immigrants in a such a short amount of time. Each individual Cuban's arrival and processing experience was slightly different, but generally it went something like this: Each individual's personal information was recorded, and they were temporarily placed in resettlement camps while officials tried to connect them with sponsors – typically an individual's family members in the U.S., or local churches and non-profits who could provide housing and assistance as the refugees acclimated to their new home.[11] Barring any glaring red flags, such as reported histories of violent crime in Cuban, once a sponsor was located, individuals were "paroled" into the U.S. pursuant to 8 U.S.C. § 1182(d)(5)

[7] President Jimmy Carter, Remarks and Question-and-Answer Session at the League of Women Voters Biennial National Convention (May 5, 1980).
[8] *Id.*
[9] The exact number of refugees who entered the U.S. during this time is still unknown and is recorded differently in various historical documents, articles, and court opinions. The most common number used is 125,000, though estimates range anywhere from 85,000-135,000 depending on the source.
[10] Philip Erickson, The Saga of Indefinitely Detained Mariel Cubans: *Garcia-Mir v. Meese,* 10 Loy. L.A. Int'l & Comp. L.J. 271 (1988).
[11] *Soroa-Gonzales v. Civiletti,* 515 F.Supp. 1049, 1053 (1981).

and into the care of the sponsor.[12] This statute granted the Attorney General discretion to "parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien."[13] Once the Attorney General determined that the purposes of the parole have been served, he may require the alien be returned to detention pending a final disposition on their admissibility.[14] However, because these people had not yet gone through a formal entry interview process (and possible exclusion hearing) within the INS, they were legally deemed to still be outside of the U.S. This is known as the "entry fiction."[15] So, despite the fact that thousands of refugees had been temporarily paroled into various parts of the U.S. – some as far from the Florida Coast as Wyoming and California – they were technically not in the country at all. They were "standing at the border, knocking on the door, asking for admission,"[16] still floating just off the coast on an overcrowded fishing boat, waiting. Those who were paroled into the U.S. could apply for asylum or other kinds of lawful status that would allow them to remain in the country long-term.

But parole could be revoked at any time for a number of reasons, including a criminal charge or conviction here in the U.S. or if INS discovered that an individual had a criminal history back in Cuba. In the event parole was revoked, the immigrant would be placed in an exclusion hearing before an Immigration Judge[17] who would review INS's charges and arguments why the individual should not be admitted into the country and the immigrant could

[12] Those who were unable to be connected with a sponsor were detained pending a formal exclusion hearing.
[13] 8 U.S.C. § 1182(d)(5).
[14] 8 U.S.C. § 1182(d)(5).
[15] *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206 (1953).
[16] *White Lies: The Pen.*
[17] Also known as an Administrative Law Judge, at times.

respond to those charges.[18] If the Immigration Judge found in favor of the immigrant, the charges of excludability would be dismissed and the immigrant would typically be paroled. If the Immigration Judge ruled that the individual was excludable, however, they issued an order of excludability and deportation, meaning the immigrant had not only never actually entered the U.S., but that they would also be sent back to their country of origin. Pending deportation, most immigrants in this position were detained.

But the detained Mariel Cubans found themselves in a unique predicament – Cuba refused to take them back. For years following the boatlift, the U.S. attempted to negotiate the return of about 3,000 excludable Cubans. Most of the plans and compromises were never carried out, if they were agreed upon at all, and those that were attempted quickly came to a halt. And so, the U.S. had to find a place to put these few thousand people. They found their answer in federal prisons.

Conditions of Detention (Incarceration)

It is important to acknowledge the conditions under which the excludable Marielitos lived while they were detained. Early on, INS sent them to federal prisons across the country, wherever there was room – Lompoc, Leavenworth, and Atlanta to name a few.[19] These were high-security prisons that imposed the severest conditions on the inmates that were incarcerated there.[20] The Marielitos were house in prison cells right alongside the inmates, many of whom were serving sentences for violent crimes.[21] They were surrounded by fences and brick walls with gun towers around the perimeter.[22] The Bureau of Prisons, the agency responsible to these

[18] There are several other ways for an immigrant to be placed in an exclusion hearing, but this was the most common path for most of the Mariel Cubans who were eventually detained.
[19] *Barrera-Echavarria v. Rison,* 21 F.3d 314, 317 (9th Cir. 1994).
[20] *Id.*
[21] *White Lies: The Pen.*
[22] *Barrera-Echavarria v. Rison,* 21 F.3d 314, 317 (9th Cir. 1994).

facilities, described the goal of these correctional facilities as "a balance between punishment, deterrence, incapacitation, and rehabilitation."[23]

The prisons were overcrowded and dangerous. The Leavenworth penitentiary had a rated capacity of 951, but its population totaled 1,597 in 1991.[24] The Bureau of Prisons had recommended that the Atlanta Penitentiary be shut down after a wave of inmate murders took place there in the late 1970s.[25] The Mariel Cubans languished in these conditions. There were numerous suicide attempts[26] and murders,[27] and at least one Cuban had to be transferred to a different prison for his own safety after he witnessed a prison murder.[28] And many of the Cuban refugees detained in these conditions had not been convicted of a single crime in the United States. A small number had committed serious crimes back in Cuba, but the vast majority of the prior offenses that led to orders of exclusion and deportation were for theft, usually of food or clothing.[29] The New York Times reported that some were even detained for past crimes like "killing a cow without government consent," "being a troublemaker," and "using a father's identification card to attend a carnival."[30]

There is no doubt that there were some criminals among those who arrived in the U.S. during the Mariel boatlift, but there is no publicly available evidence that Castro used the boatlift as a means to "empty Cuba's prisons and asylums" and send thousands of the criminals and dangerous people to the U.S.[31] It is important to acknowledge how racial and political tension

[23] *Id.*
[24] *Id.*
[25] *White Lies: The Pen.*
[26] *Id.*
[27] By 1982, five Cuban detainees had been killed while in detention at the Atlanta Penitentiary alone, including a 24-year-old who was murdered while he was approved for release and simply waiting for a sponsor. *Fernandez-Roque v. Smith,* 539 F.Supp. 925, 930 (N.D. Geor. 1982).
[28] *Palma v. Verdeyen,* 676 F.2d 100, 101 (4th Cir. 1982).
[29] *White Lies: The Pen.*
[30] *Id.*
[31] *Id.*

may have influenced the treatment of the Marielitos and to ponder whether that contributed to their exclusion, detention, and general denial of habeas corpus relief.

Genaro Soroa-Gonzales: A Promising Start

The first[32] – and perhaps most sympathetic – of the Mariel detainee cases is that of Genaro Soroa-Gonzales, a former medical student from Cuba. Soroa-Gonzales arrived in Key West, Florida, on May 18, 1990, as part of the Mariel boatlift and was temporarily paroled into the U.S. pursuant to 8 U.S.C. § 1182(d)(5).[33] He was transferred to a resettlement camp in Pennsylvania where he filed a request for political asylum.[34] On May 24, he underwent an interview with an INS officer about his life in Cuba. Through what appears to have been some sort of mistake or miscommunication, the INS agent interpreted Soroa-Gonzales's statement to be that he had been convicted of serious non-political drug crimes in Cuba.[35]

As a result of his supposed criminal record, Soroa-Gonzales's parole was revoked and he was incarcerated in the Atlanta Federal Penitentiary on May 28, 1980.[36] He was charged as excludable under 8 U.S.C. § 1182(a) for being an "illicit drug trafficker"[37] and for not having any valid entry documents that would allow him to come into the U.S.[38]

At a formal exclusion hearing on July 15, an Administrative Law Judge ("ALJ") found that Soroa-Gonzales had not committed any serious non-political crimes in Cuba and dismissed the corresponding charge of excludability for drug trafficking.[39] However, the ALJ also held that Soroa-Gonzales was excludable and detainable because he did not have proper entry

[32] *White Lies: The Pen.*
[33] *Soroa-Gonzales v. Civiletti,* 515 F.Supp. 1049, 1052 (1981).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] 8 U.S.C. § 1182(a)(23).
[38] 8 U.S.C. § 1182(a)(20).
[39] *Soroa-Gonzales v. Civiletti* at 1052.

documents.[40] Soroa-Gonzales immediately appealed the ALJ's decision to the Board of Immigration Appeals in accordance with 8 C.F.R. § 236.7.

While awaiting a decision from the Board of Immigration Appeals, the government refused to reinstate Soroa-Gonzales's parole or to release him on bond.[41] The only charge against him was that he had arrived in Key West without entry documents. On August 6, 1960, Soroa-Gonzales filed a petition for a writ of habeas corpus in U.S. District Court in the Northern District of Georgia.[42]

District Court Judge Martin Shoob granted the petition and issued a writ of habeas corpus on June 4, 1981 – just over a year after Soroa-Gonzales was first detained.[43] Judge Shoob reasoned that the District Court had jurisdiction to hear the case for three reasons. First, while the Court should be reluctant to overturn immigration decisions made by executive agencies, there was a "presumption of judicial reviewability of final administrative decisions" under 8 U.S.C. § 1329.[44] Given this determination, the Court also had jurisdiction under the federal question provision of 28 U.S.C. § 1331. Finally, federal courts have the authority to grant writs of habeas corpus in certain circumstances under 28 U.S.C. § 2241. Under this provision, Judge Shoob rejected the entry fiction altogether:

> [T]he notion that a decision which has the effect of incarcerating for a year in a maximum security federal prison a human being (despite the fact that he is not legally in the United States) is unreviewable because it is committed to the discretion of the executive branch, in untenable. The government's argument is antithetical to our notions of justice and in utter contradiction of our tradition of the utmost respect for the Great Writ, the writ of habeas corpus ad subjiciendum, which "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. United States Constitution, Art. 1, § 9, cl. 2.[45]

[40] *Soroa-Gonzales v. Civiletti* at 1052. The ALJ also denied his request for political asylum for lack of evidence.
[41] *Id.* at 1053.
[42] *Id.*
[43] *Id.* at 1062.
[44] *Id.* at 1055.
[45] *Id.* at 1056.

From there, Judge Shoob reached the merits of the case, grappling with the issue of whether the Attorney General had abused his discretion granted by 8 U.S.C. § 1182(d) in revoking and refusing to reinstate Soroa-Gonzales's parole.[46] Abuse of discretion exists in the immigration context if a decision is made "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group."[47]

Judge Shoob determined that it was unfair of the government to detain Soroa-Gonzales solely for failure to have proper entry papers when the government knew all along that almost all of the Cuban refugees would not have proper documentation: "The Court will not even entertain the argument that petitioner's parole could be revoked for this lack of entry papers. Such a determination, in light of the circumstances of the 'Freedom Flotilla' and the parole of over 100,000 others known to be lacking such papers, would clearly be an abuse of the parole discretion."[48] The Court saw the determination to detain Soroa-Gonzales – at this point for over a year – as completely arbitrary and irrational.

Additionally, Soroa-Gonzales's continued detention violated 8 C.F.R. § 212.5(b), which requires that a noncitizen who cannot be excluded or deported within "a reasonable time" must be released on parole, except when the noncitizen poses a risk to security or is likely to abscond. Judge Shoob wrote, "A reasonable time has come and gone, and no public interest in petitioner's detention is apparent other than those public interests which support the continued detention of

[46] *Id.* at 1049.
[47] *Hang v. INS,* 360 F.2d 715, 719 (2d Cir. 1966).
[48] *Soroa-Gonzales v. Civiletti,* 515 F.Supp. 1049, 1060 n.14 (1981).

all the Cuban refugees."[49] Therefore, the Attorney General had abused his discretion in violation of 8 U.S.C. § 1182(d), and Soroa-Gonzales was granted a writ of habeas corpus.[50]

On June 5, 1981, Genaro Soroa-Gonzales was released from the Atlanta Penitentiary.[51] A young family sponsored and housed him for a few months before he moved out on his own. He stayed in Atlanta, leading a quiet life, until his death in 2006 at the age of 70.[52] This case sparked a chain of similar habeas corpus petitions by Mariel detainees across the country, though few others were granted the same relief as Soroa-Gonzales.

Moises Garcia-Mir & Rafael Fernandez-Roque: The Class Actions

The success of Soroa-Gonzales and his release from detention sparked many more of the Mariel Cubans to file petitions for habeas corpus. Several hundred even joined together to file a class action suit seeking political asylum and release from detention.[53] Going into detail about the procedural posture and various tangential issues discussed in these series of cases would not only exceed the prescribed word limit, but it would also go far beyond the summary purpose of this paper. Below, I broadly discuss the main arguments in the *Fernandez-Roque* and *Garcia-Mir* litigation and their treatment by the district and circuit courts.

Even before Soroa-Gonzales was ordered released from detention in Atlanta, Moises Garcia Mir filed a class action complaint in the U.S. District Court for the District of Kansas, seeking declaratory judgement and preliminary and permanent injunctions.[54] The class of detained Mariel Cubans alleged that the continued detention of the plaintiffs violated U.S. municipal law and international law, and sought relief in the form of release from detention or, alternatively, an

[49] *Id.* at 1061.
[50] *Id.*
[51] *White Lies: The Pen.*
[52] *Id.*
[53] *See generally* Philip Erickson, The Saga of Indefinitely Detained Mariel Cubans: *Garcia-Mir v. Meese,* 10 Loy. L.A. Int'l & Comp. L.J. 271 (1988).
[54] *Fernandez-Roque v. Smith,* 539 F.Supp. 925, 928 (N.D. Geor. 1982).

order that the government conduct "procedurally adequate hearings to determine whether continued detention [of the class] is warranted, by a finding that the detainee is likely to abscond, is a threat to the security of the United States, or is a serious threat to persons or property."[55] Meanwhile, Rafael Fernandez-Roque initiated a separate class action suit for a writ of habeas corpus for the Cuban detainees who the Attorney General had refused to parole due to their lack of entry documents.[56] The cases was then transferred and consolidated into a single case in the Northern District of Georgia when the remaining Marielitos in Kansas were transferred to the Atlanta Penitentiary. After being transferred, the case transformed into a claim for habeas corpus on the grounds that the Attorney General had abused his discretion on a classwide basis by denying or revoking parole to the Cuban refugees.[57]

At the first hearing in Atlanta on August 17, 1981, the government failed to show sufficient cause for the class members' continued detention, and Judge Martin Shoob ordered 266 of them be released on parole as soon as they were approved for sponsorship with an American Council of Volunteer Agencies group.[58] The Court also ordered the release of 155 detainees to after the government stated it "had no further objection to [their] release."[59] In an order dated April 28, 1992, Judge Shoob concluded that the Court had jurisdiction over the habeas claim and that the Attorney General had abused his discretion in detaining these immigrants on the same basis he expressed in *Soroa-Gonzales,*[60] described above. He also determined that the Cubans waiting to be paroled possessed a liberty interest in their parole because the Attorney General's Status Review Plan (which established parole decision-making procedures) violated their constitutional

[55] *Id.*
[56] *Fernandez-Roque v. Smith,* 734 F.2d 576, 580 (11th Cir. 1984).
[57] *Fernandez-Roque v. Smith,* 539 F.Supp. 925, 928 (N.D. Geor. 1982).
[58] *Id.* at 929.
[59] *Id.*
[60] *Soroa-Gonzales v. Civiletti,* 515 F.Supp. 1049 (1981).

right to due process.[61] However, he was forced to defer granting the injunction-turned-habeas pending the government's appeal.[62]

On appeal to the Eleventh Circuit, the Court rejected Judge Shoob's holdings and his reasoning. Once again, they stated that, because the Cuban detainees had never been formally admitted into the country, they had no constitutional right to due process.[63] Furthermore, the Court officially concluded that "parole is part of the admissions process…Because the Cubans lack a constitutional liberty interest, we need not reach the question of whether the Attorney General's plan satisfies due process."[64] Finally, they held that the Attorney General's Status Review Process was sufficiently reasonable such that it should be assumed that parole decisions made under that process were likely not an abuse of discretion.[65] The judgement of the district court was reversed and remanded.

By 1985, the U.S. government was actively negotiating the return of some of the Mariel Cubans to their country of origin.[66] Because of the renewed possibility of deporting the detainees, the Attorney General temporarily suspended releasing anyone on parole, which the Cubans again alleged violated his discretion under § 1182(d)(5).[67] Despite Judge Shoob's agreement with the Cubans and his order that the Attorney General resume the parole program, the Eleventh Circuit concluded that there was no abuse of discretion because the Attorney General had "advanced a facially legitimate and bona fide reason" for suspending the release program – he claimed that Cuba's recent agreement to take back some of the detainees created an

[61] *Fernandez-Roque v. Smith,* 734 F.2d 576, 579 (11th Cir. 1984).
[62] *Fernandez-Roque v. Smith,* 539 F.Supp. 925, 949 (N.D. Geor. 1982).
[63] *Fernandez-Roque v. Smith,* 734 F.2d 576, 581 (11th Cir. 1984).
[64] *Id.*
[65] *Id.* at 583.
[66] *Garcia-Mir v. Smith,* 766 F.2d 1478, 1481 (11th Cir. 1985).
[67] *Id.* at 1485.

increased risk that paroled individuals would abscond.[68] They even directly addressed Judge Shoob, nearly demanding that he continue to uphold the entry fiction.

> As a general matter, we believe that the district court's treatment of this litigation suggests that it views the plaintiffs as persons who should be accorded at least some of the legal protections given to those who have effected an entry into this country. This, however, improperly blurs the fundamental distinction between excludable aliens and deportable aliens which permeates our immigration law… These legal realities may be harsh, but they are that way by design.[69]

Miguel Mayet Palma: A Different Outcome

Miguel Mayet Palma arrived in the U.S. on June 3, 1980, as part of the Mariel boatlift.[70] Like most of the refugees, he lacked proper entry documents. He was deemed excludable by an Immigration Judge in April 1981 due to his failure to present proper entry documents[71] and his criminal history back in Cuba, which Mayet Palma reported was for theft of a violin and a radio. These past convictions were considered "crimes of moral turpitude" and an excludable offense under 8 U.S.C. § 1182(a)(9). His subsequent appeal to the Board of Immigration Appeals was dismissed on the merits,[72] and he became subject to a final order of removal.[73] He was initially detained at the Federal Penitentiary in Atlanta but was transferred to Petersburg for his own protection after he witnessed a prison murder.[74]

In accordance with new procedures introduced by the Attorney General in July 1981,[75] Mayet Palma's file was reviewed by a panel of INS and DOJ officials, who recommended he not be released on parole.[76] Following a hearing where Mayet Palma was represented by legal counsel,

[68] *Id.*
[69] *Id.* at 1484.
[70] *Palma v. Verdeyen,* 676 F.2d 100, 102 (4th Cir. 1982).
[71] 8 U.S.C. § 1182(a)(20).
[72] *In re Mayet Palma,* A23 220 135 (B.I.A. Jan. 13, 1982) (unreported).
[73] *Palma v. Verdeyen* at 102.
[74] *Id.* at 101.
[75] *See Palma v. Verdeyen* at 102 for full explanation of new procedure.
[76] *Palma v. Verdeyen* at 103.